In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

INDEX TO APPENDIX

RELEVANT DOCKET ENTRIES

No. 71-8-973 in Bankruptcy

Date 1971	
September 13	Notice of Claim of Unconsitutionality dated 5/28/71 filed
	Motion for leave to file petition and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge in bankruptcy dated 5/28/71 filed.
	Affidavit in support of above motion, under the In Forma Pauperis Statute, 28 U.S.C. Sec. 1915(a) etc. filed
	Notice of Motion of U.S.A. to intervene, etc. filed
	Decision and order filed. For the reasons set forth it is ORDERED that petitioner's motion for leave to file his petition in bankruptcy without prepayment of any of the filing fees is granted and the Clerk of this Court is directed to accept said petition for filing and to refer same to a Referee, etc.
September 30	Above paper sent to Referee Price
October 8	Notice of Appeal filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of	In Bankruptcy No.
ROBERT WILLIAM KRAS, Petitioner in Bankruptcy	NOTICE OF CLAIM OF UNCONSTITUTIONALITY

NOTICE is hereby given, pursuant to Rule 24 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York, of this petitioner's claim before the referee in bankruptcy that provisions of the federal bankruptcy law which condition a discharge in bankruptcy upon the payment of the filing fees, Bankruptcy Act, 11 U.S.C. §§ 32(b)(2), 32(c)(8), 95(g), and U.S. Supreme Court General Order in Bankruptcy 35(4), violate this petitioner's Fifth-Amendment rights of due process and equal protection

Dated: New York, New York
May 28, 1971

/s/ Kalman Finkel
MORTON DICKER, Esq., and
KALMAN FINKEL, Esq.
Attorneys for Petitioner
The Legal Aid Society
267 West 17th Street
New York, New York 10011
691-8320

[Title Omitted in Printing]

MOTION FOR LEAVE TO FILE PETITION AND PROCEED IN BANKRUPTCY WITHOUT PAYMENT OF ANY OF THE FILING FEES AS A CONDITION PRECEDENT TO DISCHARGE IN BANKRUPTCY

Now comes the petitioner in bankruptcy and moves for leave to file his petition and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge, as he is unable to pay or promise to pay the fees even in small installments and also provide for the day-to-day necessities of himself and his dependents.

Dated: New York, New York
May 28, 1971

[Signature of Counsel Omitted]

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND PROCEED IN BANKRUPTCY WITHOUT PREPAYMENT OF THE FILING FEES AS A CONDITION PRECEDENT TO DISCHARGE, UNDER THE *IN FORMA PAUPERIS* STATUTE, 28 U.S.C. § 1915(a), OR, IN THE ALTERNATIVE, ON THE GROUNDS OF THE UNCONSTITUTIONALITY OF THE FILING FEE REQUIREMENT AS APPLIED TO THIS PETITIONER

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT WILLIAM KRAS, being duly sworn, deposes and says:

1. I am the petitioner in bankruptcy in this proceeding and make this affidavit in support of my motion for leave to file my petition in bankruptcy and proceed to discharge without prepayment of any of the filing fees, under the federal *in forma pauperis* statute, 28 U.S.C. § 1915(a), or, in the alternative, on the grounds of the unconstitutionality, as applied to me, of the filing fee requirement contained in the Bankruptcy Act, 11 U.S.C. §§ 32(b), 32(c)(8), 68(c)(1), 95(g), and General Order 35(4).

2. I reside in a 2½ room apartment with my wife and our two children, ages 5 years and 8 months, and my mother and her 6-year-old daughter. My 8-months-old son Jared has cystic fibrosis and is presently in Cumberland Medical Center undergoing treatment.

3. I have been unemployed since May, 1969, except for some odd jobs from which I earned approximately $300 in 1969 and $300 in 1970. My last steady job was as an insurance agent with the Metropolitan Life Insurance Company. I was discharged from Metropolitan in 1969 because premiums which I had collected were stolen from my home by an intruder and I was unable to make up the amount to Metropolitan. Metropolitan's claim against me has increased to $1012.64 and is one of the debts listed in my bankruptcy petition. I have diligently sought steady em-

ployment in New York City, but because of the bad references given by Metropolitan to prospective employers I have been unsuccessful. I attempted to find employment in Connecticut but was unsuccessful there as well and returned to New York City. My wife was employed until March, 1970, when she was forced to stop because of her pregnancy. All of her attention will now be devoted to caring for our son Jared, who is coming out of the hospital soon.

4. My wife and I and our two young children, together with my mother and her young child, subsist entirely on the $105 semi-monthly public assistance allowance for my family and the $78 semi-monthly public assistance allowance for my mother and her daughter. These welfare benefits are all expended as budgeted to pay for our rent—$102 per month—and the day-to-day necessities of our existence. I own no automobile, stocks, bonds, real estate, valuable personal property, savings account, or any other non-exempt assets under the bankruptcy law. I receive no unemployment or disability benefits. The sole assets which I possess are $50 worth of essential household goods and wearing apparel which are exempt from distribution in bankruptcy pursuant to 11 U.S.C. § 24 and CPLR § 5205. I also have a couch in storage on which are owed payments of $6 per month and which has negligible marketable value.

5. Because of my poverty, I am wholly unable to pay or promise to pay the filing fees, even in small installments, as a condition precedent to discharge and also provide myself and my dependents with day-to-day necessities. I have been unable to borrow money from my family, relatives, or friends. One of the debts of which I seek a discharge in bankruptcy is a loan from my wife's grandmother. The New York City Department of Social Services refuses to allot money for payment of the bankruptcy filing fees. I have no prospect of immediate employment.

6. I earnestly seek a discharge in bankruptcy of substantial indebtedness in the amount of $6428.69 in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that I get a discharge of my debt to Metropolitan Life Insurance Company soon, because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad

references which prevent my getting employment. When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care of my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare.

6. I believe that I am entitled to a discharge in bankruptcy of all the debts except taxes listed in my petition, including the debt to Metropolitan Life Insurance Company.

7. I am represented in this proceeding without fee by Morton Dicker and Kalman Finkel of The Legal Aid Society.

WHEREFORE, I respectfully pray that this referee grants my motion for leave to file my petition in bankruptcy and proceed to discharge without prepayment of any of the filing fees.

/s/ Robert William Kras
ROBERT WILLIAM KRAS

Sworn to before me this 28th day of May, 1971.
/s/ Stephen Holbreich

STEPHEN HOLBREICH
NOTARY PUBLIC, State of New York
No. 52-1881530
Qualified in Suffolk County
Term Expires March 30, 1973

[Title Omitted in Printing]

MOTION OF THE UNITED STATES OF AMERICA TO INTERVENE

The United States of America, by its undersigned attorneys, pursuant to Rule 24 of the Federal Rules of Civil Procedure, hereby moves to intervene as a party in the above-entitled action on the ground that a statute of the United States confers an unconditional right to intervene, and moves that the United States be granted 45 days from the date on which the instant motion to intervene is granted within which to file a memorandum on the issues involved herein.

In support of this motion, the Court is respectfully referred to the proposed Intervenor's Complaint and Memorandum in Support of the United States of America's Motion to Intervene, filed herewith.

[Signatures of Counsel Omitted]

[Title Omitted in Printing]

ORDER

After due consideration, the motion of the United States of America to intervene as a party in the above-entitled proceedings is hereby granted and the United States is given 45 days from the date of this Order within which to file a memorandum on the issues involved in these proceedings.

Brooklyn, New York
July 2, 1971

/s/ Anthony J. Travia
United States District Judge

[The opinion and order of the district court are omitted. They may be found as an appendix to the Jurisdictional Statement, pp. 11-26.]

[Title Omitted in Printing]

ORDER

At Brooklyn, New York, in said district, on the 17th day of December, 1971:

IT APPEARING THAT Robert William Kras of Brooklyn, New York, in the County of Kings, State of New York, was duly adjudged a bankrupt on a petition filed by him on September 13, 1971 and that a notice of a first meeting of creditors on October 14, 1971 was mailed to all scheduled creditors of the bankrupt, and

IT FURTHER APPEARING THAT the United States of America obtained an order to show cause returnable on October 14, 1971 directing all interested parties to show cause why all further proceedings in the above-captioned bankruptcy action should not be stayed pending the decision of the United States Supreme Court in the appeal filed by the United States of America on October 8, 1971 from the order of the Honorable Anthony J. Travia, entered on September 13, 1971, directing the clerk to accept and file the petition in bankruptcy of Robert William Kras without prepayment of any filing fee; and

IT FURTHER APPEARING THAT the bankrupt, Robert William Kras, having opposed the application of the United States of America for a stay of all further proceedings in the above-captioned bankruptcy action and having requested that the bankrupt be allowed to proceed up to, but not including, the point of actual discharge pending the disposition of the appeal by the United States Supreme Court, and

IT FURTHER APPEARING THAT a hearing on the order to show cause was held on October 14, 1971, and that the United States of America, appearing by its attorney, ROBERT A. MORSE, United States Attorney for this district, Mary P. Maguire, Assistant United States Attorney, of counsel, consented to allowing the bankrupt, Robert William Kras, to proceed up to, but not including, the point of discharge pending the disposition of the appeal by the United States Supreme Court, it is

ORDERED that the bankrupt, Robert William Kras, shall be allowed to conduct all necessary proceedings in the

above-captioned bankruptcy action up to but not including the actual discharge of the bankrupt, and it is further

ORDERED that the discharge of the bankrupt, Robert William Kras, is stayed pending the disposition of the appeal by the United States Supreme Court.

/s/ Manuel J. Price
Referee in Bankruptcy

SUPREME COURT OF THE UNITED STATES

No. 71-749

UNITED STATES, *Appellant*,

v.

ROBERT WILLIAM KRAS

APPEAL from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 22, 1972

SUPREME COURT OF THE UNITED STATES

No. 71-749

UNITED STATES, *Appellant*,

v.

ROBERT WILLIAM KRAS

ON CONSIDERATION of the motion of the appellee for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 22, 1972

☆ U.S. Government Printing Office: 1972—459-891/556

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion and order of the district court (App. A, *infra*, pp. 11–26)are not yet reported.

JURISDICTION

The United States intervened, pursuant to 28 U.S.C. 2403, in this bankruptcy proceeding because the constitutionality of sections of the Bankruptcy Act[1] which require the payment of a filing fee prior

[1] Sections 14(b) and 14(c) of the Bankruptcy Act, 11 U.S.C. 32(b), and (c)(8) provide for the payment of the required fees as a condition to discharge in bankruptcy. The amount of the fees, totalling $50, is specified in sections 40(c)(1), 48(c) and 52(a) of the Act, 11 U.S.C. 68(c)(1), 76(c), 80(a).

to discharge were drawn into question. The judgment of the district court declaring those provisions unconstitutional was entered on September 13, 1971 (App. A, *infra*, p. 11). A notice of appeal was filed on October 8, 1971 (App. B, *infra*, p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the provisions in the Bankruptcy Act requiring the payment of a $50 filing fee as a precondition to discharge in voluntary bankruptcy proceedings are unconstitutional.

STATUTE AND ORDER INVOLVED

Pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's General Order in Bankruptcy No. 35, are set forth in Appendix C, *infra* pp. 28–31.

STATEMENT

Appellee Kras filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York on May 28, 1971. Accompanying the petition was an affidavit stating that appellee was indigent and a motion for leave to proceed in bankruptcy without payment of the filing fees required as a precondition to discharge by the Bankruptcy Act, 11 U.S.C. 11 *et seq.* The appellee alleged that he supported his wife, two children, mother and his mother's small child on semi-monthly public assistance allowances of $183; that he had not been regularly employed since May, 1969; that he had no assets except $50 in exempt clothing and household

goods; and that he was "wholly unable to pay or promise to pay the filing fees, even in small installments * * *." He contended that the *in forma pauperis statute* (28 U.S.C. 1915) created an exception for indigents to the filing fee requirements of the Bankruptcy Act and that, if it did not, the latter requirements were unconstitutional. The United States intervened to defend the constitutionality of the filing fee requirements.

The district court held that the *in forma pauperis* statute did not create an exception to the filing fee provisions of the Act in favor of indigents, but further that "the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates the Fifth Amendment right of due process, including equal protection." (App. A, p. 21).[2]

THE QUESTION IS SUBSTANTIAL

The district court held unconstitutional a significant provision of a major act of Congress, namely, the requirement that a $50 filing fee be paid before a discharge in bankruptcy can be obtained. The constitutionality of this provision has been upheld in the only appellate ruling on the point. *In re Garland,* 428 F. 2d 1185 (C.A. 1), certiorari denied, 402 U.S. 966. There are several pending cases in which the constitutionality of the provision also is challenged.[3] This

[2] The case has been assigned to a referee in bankruptcy, who conducted the first meeting of creditors but stayed the discharge pending this appeal.

[3] In *In re Read* (Civil No. Bk-71-826), a referee in bankruptcy in the Western District of New York has held the fee provisions unconstitutional. A referee in the Southern District

Court should determine the constitutionality of this provision.

1. Sections 40(c)(1), 48(c) and 52(a) of the Bankruptcy Act respectively require the payment of $37 for the referees' salary and expense fund, $10 for the compensation of trustees, and $3 as a filing fee. General Order in Bankruptcy 35(4) permits the payment of these fees in installments over a six to nine-month period. Section 14(b)(2) of the Bankruptcy Act allows the discharge of a bankrupt only after "the filing fees required to be paid by this title have been paid in full * * *." Section 14(c) includes among the grounds upon which a discharge must be denied the "fail[ure] to pay the filing fees required to be paid by this title in full * * *." Section 14(c)(8). General Order in Bankruptcy 35(4) likewise provides that "[n]o proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full."

Under the present compensation system—adopted by Congress in 1946 as part of a major revision of the Bankruptcy Act—these fees are paid into a Referee's Salary and Expense Fund in the Treasury and all referees' salaries and expenses are paid from that

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of New York has upheld the provisions. *In re Partilla* (Civil No. 71-B-380). The issue is pending in at least two other jurisdictions. *In re Miller*, C.A. 6, No. 20,059; *In re Hickey* (N.D. Miss., Civil No. DBk71-52). Two other district courts have held the filing fee provisions to be unconstitutional. *In re Smith*, 323 F. Supp. 1082 (D. Colo.); *In re Naron* (D. Ore., No. B-1527), decided November 29, 1971.

Fund.[4] Thus the fee provisions are designed to insure that the bankruptcy referee system is self-sustaining, as Congress has intended from the system's inception. See Sen. Rep. No. 959, 79th Cong., 2d Sess., p. 1. The Senate Committee report accompanying the legislation specifically noted that amended Section 40(c) "abolishes the so-called pauper petitions." The committee concluded that because under the old system it was the widespread practice of referees ultimately to demand and obtain payment of fees in "pauper" proceedings, a system allowing for the payment of fees by installment in meritorious cases would be a desirable substitute for the former pauper provisions. S. Rep. No. 959, 79th Cong., 2d Sess., p. 7.

Elimination of the filing fee requirement would thwart the Congressional intent that the bankruptcy system be self-sustaining. The most recent figures show that of the 166,338 non-business bankruptcies terminated in 1969, more than 64 percent of these (107,481) were cases in which the bankrupt had no non-exempt assets. *Tables of Bankruptcy Statistics*, Administrative Office of United States Court, February 1971. The loss to the Referees' Salary and Expense Fund if filing fees cannot be required for indigents has been estimated at $3 million (see *In re*

[4] Prior to the 1946 revisions, each referee met his expenses and received compensation by collecting fees in the cases before him. For several reasons, Congress determined that such a fee-compensation system was undesirable. See S. Rep. No. 959, 79th Cong., 2d Sess., p. 2.

Garland, supra, 428 F. 2d at 1188), an expense that would have to be borne either by other bankrupts or by the general revenues.

2. Contrary to the district court's conclusion, the mandatory filing fee provisions of the Bankruptcy Act does not violate the due process clause of the Fifth Amendment.

(a) The right of a voluntary petitioner in bankruptcy to a discharge of his debts is not a fundamental or constitutionally-mandated right such as the right to vote or to travel freely. *In re Garland, supra,* 428 F. 2d at 1188; see *In re Zidoff,* 309 F. 2d 417, 419 (C.A. 7); compare *Shapiro* v. *Thompson,* 394 U.S. 618; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663; *Griffin* v. *Illinois,* 351 U.S. 12. Pursuant to Article I, Section 8 of the Constitution, Congress has the power "To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Congress has the power to determine whether or not there shall be bankruptcy laws, and, indeed, for long periods in the nation's history, Congress did not provide any bankruptcy law at all.[5] Moreover, "Congress may prescribe any regulations concerning discharge

[5] Prior to the present Bankruptcy Act, passed in 1898, the nation was without a federal bankruptcy law except for three short periods. An early Act, which did not permit voluntary petitions and conditioned discharge on the consent of creditors, was passed in 1800 and repealed in 1803. 2 Stat. 19, c. 19; 2 Stat. 248, c. 6. A second Act permitting voluntary bankruptcies was passed in 1841 and repealed in 1843. 5 Stat. 440, c. 9; 5 Stat. 614, c. 82. A third Act was passed in 1867 and repealed in 1878. 14 Stat. 517, c. 176; 20 Stat. 99, c. 160.

in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law * * *". *Hanover National Bank* v. *Moyses,* 186 U.S. 181, 192; accord: *United States* v. *Fox,* 95 U.S. 670, 672.

Where no fundamental constitutional right is involved, this Court has held that when dealing with "a withholding of a noncontractual benefit under a social welfare program"

> we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Flemming v. *Nestor,* 363 U.S. 603, 611. See also *Dandridge* v. *Williams,* 397 U.S. 471, 485.

As the First Circuit held in *In re Garland, supra,* the classification created by the fee provisions has a reasonable basis. Since Congress had determined that many persons who had filed petitions prior to 1946 without paying the filing fees later paid them, it was warranted in replacing the provision of former Section 51(2) for waiver of filing fees for indigent persons with the present provision for the installment payment of fees (Section 52(a)). Under this system, as implemented by this Court, the $50 filing fee can be paid over six months and for good cause, the period may be extended to nine months. Payment of $50 over a six-month period amounts to only $1.92 per week. While providing adequate relief for the needy, the installment system aids the financial integrity of the self-

supporting bankruptcy system by protecting it against specious claims of poverty.*

(b) The refusal to grant a discharge in bankruptcy except upon the payment of the minimal filing fees does not involve the denial of "access to [the] courts" which underlay this Court's decision in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, that a state cannot refuse to entertain an action for divorce by an indigent who cannot pay the court filing fees and expenses of service of process.

As the First Circuit pointed out in *In Re Garland*, *supra* (428 F. 2d at 1187):

> * * * [O]ne reason we would give for distinguishing this case from ordinary litigation, is that the "statutory fees * * * are primarily for services for the benefit of the bankrupt." *In re Bean* [100 Fed. 262, 263 (D. Vt.)]. Although bankruptcy is administered in a "court" it is in most particulars a very unusual court. "The core of bankruptcy is administrative." *St. Regis Paper Co.* v. *Jackson*, 5 Cir., 1966, 369 F. 2d 136, 141. Referees are primarily administrators who, together with trustees, render financial services. A bankruptcy is not litigation in the normal understanding of the term, but merely a process under which the bankrupt

* The fact that before 1946 so many persons initially claiming inability to pay filing fees later paid them (see S. Rep. No. 959, 79th Cong., 2d Sess.) suggests that a significant portion of the initial claims may not have been justified (although, of course, many persons may have obtained the necessary funds subsequent to their initial claim of poverty). The conditioning of discharge on ultimate payment of fees makes the enforcement of the fee provisions self-policing—an important factor in the essentially non-adversary bankruptcy adjudication system.

files a petition, turns over his assets, if any, and awaits the receipt of a discharge.

A voluntary bankruptcy petition does not request legal relief in the usual sense, but rather asks the referee and trustee to administer the bankrupt's assets, if any. These are financial services which the government provides and for which it is appropriate that payment should be made.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
L. PATRICK GRAY, III,
Assistant Attorney General.
ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

DECEMBER 1971.

APPENDIX A

United States District Court, Eastern District of New York

(In Bankruptcy No. —— Decision and Order)

September 13, 1971

IN THE MATTER OF ROBERT WILLIAM KRAS,
PETITIONER IN BANKRUPTCY

TRAVIA, District Judge.

The petitioner moves for leave to file his petition in bankruptcy and proceed without prepayment of any of the filing fees[1] as a condition precedent to a discharge in bankruptcy. The motion comes directly to the Court before being referred to a Referee by the Clerk of the Court.

Under the Individual Assignment System presently operating in this District, new civil and criminal cases are filed in the Clerk's Office, given a docket number and then assigned, at random, to one Judge for all purposes. In a bankruptcy proceeding, "* * * the clerk shall, immediately *upon the filing* of a petition * * *, refer the case to a referee."[2] (Emphasis added). The issue in this proceeding is whether the Clerk shall file the petition without the payment of the filing fees. Since the Clerk has not filed the petition, the matter has not been referred to a referee and the issue is be-

[1] Such fees are presently required by the Bankruptcy Act, 11 U.S.C. §§ 32(b)(2), 32(c)(8), 68(c)(1), 96(g), and U.S. Supreme Court General Order in Bankruptcy 35(4).

[2] Bankruptcy Rule 2(a) E.D.N.Y.

fore this Court.[3] A decision granting the motion will, in effect, direct the Clerk of the Court to file the petition, assign the same a docket number and refer the proceeding to a Referee in Bankruptcy. A decision denying the motion will end the proceeding without giving the petitioner an opportunity to an adjudication of his rights in a bankruptcy proceeding.[4]

According to his affidavit submitted in support of the motion,[5] petitioner lives in a two and one-half room apartment with his wife, his two young children, his mother and her young child. His younger child has cystic fibrosis and, at about the time the affidavit was prepared, was in Cumberland Medical Center. Except for some minor odd jobs, petitioner has been unemployed since May 1969. His last steady employment was as an insurance agent for Metropolitan Life Insurance Company (hereafter "Metropolitan") from which he was discharged because premiums which he had collected were stolen from his home and he was unable to make up the amount. Petitioned has since attempted to secure employment but has been unsuccessful because of bad reference given by Metropolitan. Petitioner's wife was employed until March 1970 when she had to stop working because of her pregnancy. She will be unable to work since all of time will be spent caring for the younger child.

[3] The Court's research indicates that this is the first proceeding involving this issue which has not first been presented to a referee for decision. See *In re Garland*, 428 F. 2d 1185 (1st Cir. 1970), *cert. denied*, 39 U.S.L.W. 3487 (May 4, 1971); *In the Matter of Smith*, 323 F. Supp. 1082 (D. Colo. 1971); *In Richard Partilla*, Bankruptcy No. 71-B-380 (S.D.N.Y., pending before Referee Babitt).

[4] Of course, such a decision would not affect whatever appellate rights petitioner might have.

[5] Since the factual allegations in the affidavit have not been challenged, they will be accepted as true.

Petitioner's present financial picture is not pleasant, to say the least. He and his family, including his mother and her daughter, live on a public assistance allotment of $366.00 per month. All of this amount is required for rent and the necessities of life. Petitioner alleges his owns no non-exempt assets and that his only assets consist of $50.00 worth of essential household goods and clothing which are exempt from distribution under 11 U.S.C. § 24 and New York C.P.L.R. § 5205(a). Because of these circumstances, petitioner claims he is unable to pay the filing fee and cannot promise to pay the fee in installments.[6] Neither the New York City Department of Social Services nor family, relatives, or friends have been able to help petitioner raise the money to meet the cost of filing the petition. Petitioner seeks a discharge in bankruptcy of his indebtedness in the amount of $6,428.69 and states as his reason, among other things, "* * * in order to get a new start in life."[7] He especially seeks a discharge of his indebtedness to Metropolitan to improve his chances of securing employment elsewhere.

To secure relief, petitioner makes both statutory and constitutional arguments.[8] In view of the long established practice of refraining from passing on the

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[6] Provision for installment payments over a period as long as nine months is made by General Order 35(4).

[7] Petitioner's affidavit, p. 3.

[8] Because of the claims of unconstitutionality, petitioner has submitted the notice required by Rule 24, General Rules, E.D.N.Y. Rule 24, applicable to cases where the United States is not a party, requires a party challenging the constitutionality of an Act of Congress to give notice of such fact to the Court "* * * to enable the Court to comply with 28 U.S.C. §2403. * * *" Section 2403 provides for judicial certification to the Attorney General when the constitutionality of an Act of Congress is drawn in question. This Court, by letter dated

constitutionality of Acts of Congress unless compelled to do so, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936, Brandeis, J. concurring), petitioner's statutory claim will be dealt with first.

I

Petitioner argues that the Bankruptcy Act should be liberally construed in view of its broad remedial purpose and that the federal in forma pauperis statute, 28 U.S.C. § 1915(a), should be applied to bankruptcy proceedings in accordance with such construction. On its face, petitioner's argument possesses some merit. Section 1915(a) provides:

> "Any Court of the United States may authorize the commencement, prosecution or defense of *any suit, action or proceeding,* civil or criminal, or appeal therein, *without prepayment of fees* and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." (Emphasis added).

As petitioner states, "By its own terms this statute is as applicable to bankruptcy proceedings as to any other proceedings in federal court."[9] And since the filing fee in bankruptcy, $50.00,[10] is much greater

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June 2, 1971, certified to the Attorney General that the constitutionality of several sections of the Federal Bankruptcy Act, viz., 11 U.S.C. §§ 32(b)(2), 32(c)(8), 68(c)(1), 95(g) and U.S. Supreme Court General Order in Bankruptcy 35(4) was drawn in question. On July 2, 1971, the Attorney General's Office replied that it wished to intervene as amicus curiae, and on August 3, 1971, submitted a brief in opposition to this motion.

[9] Petitioner's Memorandum, p. 7.

[10] The fee is $40.00 in no-asset cases. 11 U.S.C. § 76(c).

than that in other civil litigation, generally $15.00,[11] the need for the application of § 1915 to bankruptcy proceedings is obvious. Petitioner further argues that nothing in the Bankruptcy Act or the General Orders—

> "specifically requires that persons must pay the filing fee as a prerequisite to discharge even if they are so poor that they do not have at the time of filing and cannot hope to have over 9 months enough non-essential assets to pay any part of the filing fees."[12]

Except for evidence that Congress intended to require payment of filing fees as a condition precedent to discharge bankruptcy, this Court might be inclined to grant petitioner's motion on the ground that § 1915(a) is applicable to bankruptcy proceedings. That evidence, however, compels this Court to reject petitioner's statutory argument.

The Bankruptcy Act of 1898 provided for a waiver of fees at the time of the filing of the petition on an affidavit of inability to pay.[13] In 1946, Congress passed the Referees' Salary Bill[14] which did away with bankruptcy petitions in forma pauperis. The Senate Report on that Bill stated:

> "Under the existing statutory provisions a bankrupt is permitted to file a petition without the payment of any filing fees where he accompanies it with an affidavit indicating his inability to pay them. In such instances, however, many of the referees have later collected the filing fees in installments from the bankrupts. It is deemed desirable in lieu of the present widespread practice of demanding payments ultimately, to abolish pauper petitions.

[11] 28 U.S.C. § 1914.

[12] Petitioner's Memorandum, pp. 6–7.

[13] Cr. 541. §§ 40(c), 51(2).

[14] 11 U.S.C. § 68.

> It seems more advisable to provide for installments in meritorious cases, and to leave the exact procedure for incorporation in the general order of the Supreme Court." [15]

Although the Senate's reasoning has been criticized,[16] it is difficult for this Court to say that Congress was unaware of the effect its action would have upon paupers' petitions. Congress knowingly deleted from the new law the former paupers' provision and substituted the requirement that a bankrupt who asserts contemporaneously with the filing of his petition that he cannot pay the fee, may pay in installments, but must pay ultimately as a condition precedent to discharge. 11 U.S.C. §§ 32(b), 32(c)(8), 68(c)(1), 95(g); General Orders in Bankruptcy 35(4)(c), 331 U.S. 873, 877.

A similar conclusion has been reached in the two other cases which have considered this issue. *In re Garland* and *In the Matter of Smith*, both *supra*, at note 3. Chief Judge Aldrich stated in the opinion of the Court, *In re Garland*, "Of more basic importance, Section 1915(a) provides for waiver of prepayment only, not for forgiveness. See section 1915(e). It cannot be read to eliminate a requirement of ultimate payment phrased as a condition precedent."

This Court agrees with the reasoning of the *Garland* and *Smith* cases on this issue.

Having disposd of petitioner's statutory claims, the Court now turns to the more difficult constitutional questions petitioner raises.

First, petitioner argues that the provisions of the Bankruptcy Act which condition a discharge in bank-

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[15] S. Rep. No. 959, 79th Cong., 2d Sess. 7 (1946).

[16] Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 1969 Colum. L. Rev. 1203, 1211.

ruptcy upon payment of a filing fee [17] deprive him of his Fifth Amendment rights to due process and equal protection of the laws.

This issue is one of first impression in this Circuit.[18] However, two other federal courts have faced the constitutional questions. In *In re Garland* [19] decided on July 8, 1970, the First Circuit, in a unanimous decision, held that the constitutional requirement of payment of a filing fee before receiving a discharge in bankruptcy does not amount to a denial of due process. More recently, on February 24, 1971, the Colorado District Court in *In the Matter of Smith* [20] disagreed with the conclusion of the First Circuit and found that the filing fee requirement of the Bankruptcy Act as applied to an indigent petitioner constituted a denial of equal protection. Thus, this Court is faced with conflicting judicial decisions, and since neither the Supreme Court nor our own Court of Appeals has ruled directly on the question, it is free to adopt that solution which it feels the Constitution requires.

At the outset, it should be noted that neither the *Garland* nor the *Smith* courts had the benefit of the Supreme Court's opinions in *Boddie* v. *Connecticut*,[21] decided on March 2, 1971. In *Boddie*, a majority of the Supreme Court relied on the Due Process Clause to strike down a Connecticut statute which had the

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[17] See note 1, *supra*, p. 2.

[18] Apart from *A. Richard Partilla*, 71-B-380, pending before a Referee in the Southern District. Se note 3, Supra, p.2.

[19] 428 F.8d 1185 (1st Cir. 1970), *cert. denied*, 401 U.S. —— (1971), 39 U.S.L.W. 3487.

[20] 323 F.Supp. 1082 (D. Colo. 1971).

[21] 401 U.S. —— (1971), 39 U.S.L.W. 4294. (See also *Tate* v. *Short*, 401 U.S. —— (1971), 39 U.S.L.W. 4301.

effect of denying individuals access to its divorce courts solely because of the inability of an individual to pay filing fees and process costs. Since there was no dispute as to applicants' inability to pay or their "good faith" in seeking a divorce, the Court reached the constitutional issue. Speaking for the majority, Mr. Justice Harlan said:

> "* * * we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one * * *
>
> Prior cases establish, first, that due process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[11]

In concurring, Mr. Justice Douglas preferred to base his decision on the Equal Protection Clause. Poverty was the invidious criterion Connecticut used in determining who might seek a divorce. Mr. Justice Brennan relied on both the Due Process and Equal Protection Clauses:

> "Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain

[11] Id. at 4295.

> fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause." [23]

On May 3, 1971, the Supreme Court denied certiorari in *In re Garland,* three Justices dissenting.[24] Such denial may have resulted from the Court's desire to proceed "slowly step-by-step, so that the country will have time to absorb its [Boddie's] full import." [25] But, for whatever reason, the Court's denial of certiorari is not to be taken as a decision on the merits of the case, *United States* v. *Carver,* 260 U.S. 482, 490 (1923), and this Court remains free to chart its own course. That course, however, is not without guideposts, particularly in view of the statements of Mr. Justice Black and Mr. Justice Douglas dissenting from the denial of certiorari in *In re Garland.* Although ironically Mr. Justice Black was the lone dissenter in *Boddie,* he feels that if that case is now the law, it should not be limited to divorce. Both Mr. Justice Black and Mr. Justice Douglas would have reversed outright. As Mr. Justice Black said:

> "The opinion in Boddie attempts to draw two distinctions between divorce and other disputes. The Court there stated that access to the judicial process in divorce matters is the 'exclusive precondition to the adjustment of a fundamental human relationship * * *.' The two elements then that require open access to the courts are that the judicial mechanism be the 'exclusive' means of resolving the dispute and that the dispute involve 'fundamental' subject matter. The first element—'exclusiveness' of the judicial process as a remedy—is no limitation

[23] Id. at 4299.

[24] Justices Black, Douglas and Brennan, 39 U.S.L.W. 3487.

[25] Mr. Justice Black's dissent from the denial of certiorari in *In re Garland,* 39 U.S.L.W. 3483.

at all. The States and the Federal Government hold the ultimate power of enforcement in almost every dispute * * *. Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

The other distinction between divorce and different kinds of controversies suggested in the Boddie opinion is the degree to which the disputes are regarded as 'fundamental.' The extent to which this requirement limits the holding of Boddie is found in the very facts of that decision—the right to seek a divorce is simply not very 'fundamental' in the hierarchy of disputes * * *. And since Boddie held that the right to a divorce was 'fundamental,' I can only conclude that almost every other kind of legally enforceable right is also fundamental to our society * * *. Even the need to be on the welfare rolls or to file for a discharge in bankruptcy seems to me to be more 'fundamental' than a person's right to seek a divorce * * *. For this Court to have first provided for governmental assumption of civil court costs in a divorce case seems to me a most unfortunate point of departure. But since that step has now been taken, I would either overrule Boddie at once or extend the benefits of government paid costs to other civil litigants whose interests are at least as important to an orderly society." [26]

Mr. Justice Douglas, relying on the Equal Protection Clause as he did in Boddie, stated:

"Today's decisions underscore the difficulties with the Boddie approach. In Boddie the majority found marriage and its dissolution to be fundamental as to require allowing indigent access to divorce court without costs. When indigency is involved I do not think there is a hierarchy of interests. Marriage and its dis-

[26] Id.

> solution are of course fundamental * * *. *Similarly obtaining a fresh start in life through bankruptcy proceeding or securing adequate housing and the other procedures in these cases violate the Equal Protection Clause* * * *[27] (Emphasis added.)

This Court can only agree that a proper interpretation of *Boddie* requires that, as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates his Fifth Amendment right of due process, including equal protection. In so concluding, this Court notes its disagreement with the First Circuit's discussion of the constitutional issues in *Garland*. There the Court treated the question not as involving access to a civil court but rather as involving an individual's right to a bankruptcy discharge. Such right, the Court decided, was not a "fundamental right, but a privilege" to which Congress may attach reasonable conditions. In light of *Boddie*, it is difficult to accept this rationale. Perhaps the *Garland* Court treated the question in this manner because it looked upon the filing fee as being "primarily for services for the benefit of the bankrupt"[28] and because it looked upon bankruptcy "not [as] litigation in the normal understanding of the term, but merely [as] a process under which the bankrupt files a petition, turns over his assets, if any, and awaits the receipt of a discharge."[29] While this is certainly an apt description of the mechanics of a bankruptcy proceeding, this Court finds more convincing the District Court opinion in *In re Smith*:

> "* * * we believe what is at stake here is not simply bankruptcy but access to court. So viewed, the question presented takes on a great-

[27] Id. at 3484.
[28] 428 F. 2d 1185, 1187.
[29] Id.

> er significance, at least for those of us who are trained in the law and who regard the legal system as fundamental to our way of life."[30]

This "greater significance" compels this Court to conclude that the statutory requirement of the payment of filing fees as a condition precedent to obtaining a discharge in bankruptcy is unconstitutional as applied to this petitioner.[31]

In so ruling, this Court accepts the petitioner's affidavit of indigence in the absence of evidence to the contrary. In view of the statement of petitioner's financial condition contained therein,[32] it seems unnecessary to decide whether petitioner need sell any exempt assets to obtain money for filing or whether a more stringent standard be adopted for indigency in the constitutional sense as opposed to the standard applied to § 1915 cases.[33] However, that is not to say that petitioner's status as an indigent will be forever unchallenged. The trustee is charged with the duty

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[30] F.Supp. 1082, 1087; *see also Griffin v. Illinois*, 351 U.S. 12 (1956).

[31] In their brief, the Government cites the case of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) for the proposition that Congress may constitutionally decide to provide benefits only to those persons who pay costs related to the benefit granted, such as discharge of debts. Reliance on the *Cohen* case is misplaced. The *Cohen* case considered the constitutionality of a statute on its face; this case involves a statute only as it applies to this petitioner. See also *Boddie*, n. 9.

[32] Petitioner's affidavit states that "[t]he sole assets which I possess are $50 worth of essential household goods and wearing apparel which are exempt from distribution in bankruptcy pursuant to 11 U.S.C. § 24 and CPLR § 5205. I also have a couch in storage on which are owed payments of $6 per month and which has negligible market value.

[33] See the thorough discussion of indigency in *In re Smith*, *supra*, at 1091–93.

of examining the bankrupt."[34] Additionally, as the Court in *Smith* concluded, the Referee's decision should make provision for the survival of petitioner's obligation to pay the filing fee.[35] Thus, the fear expressed in *Garland* ("It is easy for him to deny [having sufficient funds to pay the fee], and difficult to prove otherwise. * * * [A] very substantial number of persons who could in fact pay, will avoid doing so")[36] can be minimized. Moreover, the same problem exists in the other areas of civil litigation where § 1915(a) applies. There is no justification for allowing the mere potential for abuse of control in the constitutional area.

Secondly, this leads to a basic objection to allowing petitioner to file—the Government's fiscal interest in supporting the bankruptcy system. The petitioner in *Garland* estimated that allowing filing without payment of fees would result in a revenue loss of $3,000,000 annually.[37] Such a loss would certainly be at odds with the self-financing arrangement of the bankruptcy system. Yet, it is noteworthy that since 1966 that system has not been self-financing. The most recent figures reveal that for the 1970 fiscal year, the deficit in the Referees' Salary and Expense Fund amounted to $4,531,466, twice that of the deficit of the

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[34] U.S.C. § 75(a).

[35] The full statement of the *Smith* court on this point reads: "We think it would be constitutionally permissible, and also appropriate, for the referee, at the final disposition of this case, to fashion an order resembling a judgment for costs, which order would provide that petitioner's obligation to pay the filing fee is not permanently discharged but would arise again if and when she is no longer indigent and can pay the fee without undue hardship." (323 F. Supp. 1092, 1093).

[36] 428 F.2d 1185, 1188.

[37] *Cf. Shaeffer*, *supra*, note 16 at p. 8.

previous year.[38] The apparent difficulty, if not impossibility, of keeping the system current prompted the Judicial Conference to conclude that the principle of a self-supporting bankruptcy system is outmoded and should be abandoned.[39] The Director was authorized to draft an amendment to 11 U.S.C. § 68 to abolish the self-supporting aspect of the system. With the self-supporting feature of the bankruptcy system in jeopardy under the present fee schedule, it is clear that either those fees will have to be raised substantially or society in general will be required to bear a larger burden of the costs of the bankruptcy system. With the filing fees in bankruptcy already greater than the fees in other civil litigation in the federal courts, the latter alternative seems the wiser. However, it is not for this Court to predict the outcome of future changes in the bankruptcy system. Rather, it is this Court's conclusion that the Government's fiscal interest in the filing fee requirement is not a compelling interest. Such conclusion is supported by Mr. Justice Harlan's statement in *Boddie*:

> "In our opinion, none of these considerations [including the state's interest in allocating its financial resources] is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages."[40]

In requiring adherence to the compelling interest standard, this Court is not unmindful of the Government's argument that the less stringent "reasonable basis" test should be employed. However, like the

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[38] 1970 Annual Report of the Director, Administrative Office of the United States Courts, V-16.

[39] Report of the Judicial Conference, March 1969, pp. 23–25.

[40] 401 U.S. —— (1971), 39 U.S.L.W. 4294, 4297.

Smith court, this Court holds the Government to the more stringent equal protection test the compelling government interest test, as enunciated by the Supreme Court in *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969). In *Shapiro,* Justice Brennan held that where a fundamental right is involved, the constitutionality of the statute in question "must be judged by the stricter standard of whether it promotes a compelling state interest."[41] This Court agrees with the court in the *Smith* case that what is at stake here is not simply bankruptcy but access to court, a fundamental interest. Moreover, this Court is moved to its conclusion by the language of Justice Black dissenting from the denial of certiorari in the *Garland* case. He stated, with reference to the *Boddie* case, that:

> "Even the need to file for a discharge in bankruptcy seems to me to be more *'fundamental'* than a person's right to seek divorce * * *. And bankruptcy is designed to permit a man to make a new start unhampered by over-whelming debts in hopes of achieving a useful life." (Emphasis added).[42]

Thus, considering the right of access to the court to seek discharge in bankruptcy in light of the Supreme Court's treatment of the right to seek divorce in the *Boddie* case and in light of the reasoning in the *Smith* case, this Court can only conclude that what is at stake here is a fundamental interest requiring compliance with the "compelling government interest" standard.

The final justification for the fee requirement comes from the desire to prevent frivolous petitions. Such

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[41] 394 U.S. 618, 638.
[42] 239 U.S.I.W. 3483.

desire can have no effect on this case, since it is undisputed that the petitioner seeks to file his petition and obtain a discharge in good faith. And, as petitioner points out:

> "* * * there is presently in effect a mechanism fully adequate for discouraging frivolous petitions which waste the time of the bankruptcy court—namely, the established principle that the effect of a dismissal of a bankruptcy proceeding for whatever reason bars by res judicata an attempt to have the scheduled debts discharged in any subsequent proceeding." [43]

Accordingly, for the reasons set forth above, it is ORDERED that petitioner's motion for leave to file his petition in bankruptcy without prepayment of any of the filing fees is granted and the Clerk of this Court is directed to accept said petition for filing and to refer the same to a Referee in Bankruptcy without prepayment of any filing fee.

ANTHONY J. TRAVIS,
U.S. District Judge.

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[43] Petitioner's Memorandum, p. 17.

APPENDIX B

United States District Court, Eastern District of New York

(In Bankruptcy No. 71 B 972)

IN THE MATTER OF ROBERT WILLIAM KRAS, BANKRUPT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, Intervenor in the above-captioned action, hereby appeals to the Supreme Court of the United States from the order entered in this action on September 13, 1971, granting the bankrupt's motion for leave to file his petition in bankruptcy without prepayment of any filing fee.

This appeal is taken pursuant to 28 U.S.C. §§ 1252 and 2101.

ROBERT A. MORSE,
United States Attorney
Eastern District of NewYork
Attorney for United States,
Intervenor-Appellant
225 Cadman Plaza East
Brooklyn, New York 11201.

By (S) MARY P. MAGUIRE,
Assistant U.S. Attorney.

APPENDIX C

The Bankruptcy Act, 11 U.S.C. 1 *et seq.*, provides in relevant part:

Section 14(b), 11 U.S.C. 32(b):

(b)(1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to section 35(c)(2) of this title to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94(b) of this title. The Court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications.

(2) Upon the expiration of the time fixed in the order * * * or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

Section 14(c)(8), 11 U.S.C. 32(c)(8):

(c) The court shall grant the discharge unless satisfied that the bankrupt has * * * (8) has

[sic] failed to pay the filing fees required to be paid by this title in full * * *.

Section 40(c)(1), 11 U.S.C. 68(c)(1):

(c)(1) Except as otherwise provided in this title, there shall be deposited with the clerk, at the time the petition is filed in each case, and at the time an ancillary proceeding is instituted, $37 for each estate for the referees' salary and expense fund, as herein below established: *Provided, however,* That in cases of voluntary bankruptcy such fee, as well as the filing fees of the clerk and trustee, may be paid in installments, if so authorized by General Order of the Supreme Court of the United States.

Section 48(c), 11 U.S.C. 76(c):

The compensation of trustees for their services, payable after they are rendered, shall be a fee of $10 for each estate, deposited with the clerk at the time the petition is filed in each case, except where installment payments may be authorized pursuant to section 68 of this title * * *.

Section 52(a), 11 U.S.C. 80(a):

(a) Clerks shall charge and collect for their services to each estate, whether in a court of primary or ancillary jurisdiction, a filing fee of $3. The clerk may collect this amount in installments when such installment payments have been authorized by General Order of the Supreme Court of the United States.

Section 59(g), 11 U.S.C. 95(g):

(g) A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice of the creditors as provided in section 94 of this title, and to that end the court shall, upon entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, shall

cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information, and belief: *Provided, however,* That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

Supreme Court General Order in Bankruptcy 35(4) provides:

(4) The petition in a voluntary proceeding under Chapters I to VII or Chapter XIII of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of any installment for a period not to exceed three months.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court

may dismiss the proceeding for failure to pay costs as provided in Section 59(g) of the Act. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed, shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any, in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-749

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 11-26) is reported at 331 F. Supp. 1207.

JURISDICTION

The judgment of the district court declaring unconstitutional, as applied, those sections of the Bankruptcy Act which require the payment of a filing fee prior to discharge,[1] was entered on September 13, 1971

[1] Section 14(b) and 14(c) of the Bankruptcy Act, 11 U.S.C. 32(b), and (c)(8), and this Court's General Order in Bankruptcy 35(4)(c), provide for the payment of the required fees as a condition to discharge in bankruptcy. The amount of the fees, totalling $50, is specified in Sections 40(c)(1), 48(c) and 52(a) of the Act, 11 U.S.C. 68(c)(1), 76(c), 80(a).

(J.S. App. A, p. 11). A notice of appeal was filed on October 8, 1971 (J.S. App. B, p. 27) and probable jurisdiction was noted on February 22, 1972 (App. 11; 405 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the provisions in the Bankruptcy Act requiring the payment of a $50 filing fee as a precondition to discharge in voluntary bankruptcy proceedings are unconstitutional as applied to an indigent bankrupt unable to pay the fee.

STATUTE AND ORDER INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's *General Order in Bankruptcy* No. 35, 331 U.S. 873, 876, are set forth in the Appendix, *infra*, pp. 29–32.

STATEMENT

Appellee Robert Kras filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York on May 28, 1971. Accompanying the petition was an affidavit stating that appellee was indigent, and a motion for leave to proceed without payment of the filing fees required as a precondition to discharge by the Bankruptcy Act, 11 U.S.C. 1 *et seq.* (App 3–6).[2] In the affidavit, ap-

[2] The fees include $37 for the referees' salary and expense fund, $10 for the compensation of trustees, and $3 as a filing fee. Sections 40(c)(1), 48(c) and 52(a) of the Bankruptcy Act, 11 U.S.C. 68(c)(1), 76(c), 80(a). The Act permits the filing of a petition if the petitioner agrees to pay in installments; this Court's General Order in Bankruptcy No. 35(4)(a) authorizes installments over a six-month period, with three-month extension of this time for cause shown.

pellee alleged that he supported his wife, two children, mother and his mother's small child on semi-monthly public assistance allowances of $183; that he had not been regularly employed since May, 1969; that he had no assets except $50 in exempt clothing and household goods; and that he was "wholly unable to pay or promise to pay the filing fees, even in small installments * * * " (App. 4, 5).

Appellee contended that the *in forma pauperis* statute (28 U.S.C. 1915) created an exception for indigents to the filing fee requirements of the Bankruptcy Act and that, if it did not, the latter requirements were unconstitutional as applied to him (App. 4). The United States intervened to defend the constitutionality of the filing fee requirements (App. 7).

The district court held that "as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates the Fifth Amendment right of due process, including equal protection" (J.S. App. A, p. 21). While rejecting the contention that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), applies to bankruptcy proceedings, the court held that a discharge in bankruptcy was a "fundamental interest," which could not be denied unless a "compelling government interest was shown." The court ruled that the congressional determination to make the bankruptcy system self-sustaining was not a compelling interest. The court ordered the petition filed and directed the referee to

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"make provision for the survival of petitioner's obligation to pay the filing fee" (J.S., App. A, p. 23).[3]

SUMMARY OF ARGUMENT

I

To carry out its intention that the cost of operating the federal bankruptcy system be borne by those who make use of bankruptcy services, rather than the public at large, Congress established fixed fees applicable to all bankruptcy filings. The Bankruptcy Act of 1898 permitted a voluntary bankrupt to file his petition without paying these fees if he submited an affidavit that he was without the means to pay them. In 1946, Congress determined that these pauper petitions had been abused and should be abolished. It made payment of the fees a precondition to discharge, but provided that indigents be permitted to file their petitions and pay the fees in installments as prescribed in the *General Orders in Bankruptcy*. The fee of $50 may now be spread over as long as nine months, at a weekly rate of $1.28.

A. The district court applied an erroneous standard in concluding that the constitutionality of the fee requirement could be sustained against an Equal Protection challenge only upon a showing of a "compelling government interest." This standard of review is appropriate in cases in which the challenged classification impinges on a fundamental constitutional right. When, however, all that is at issue is a condition

[3] The case was subsequently assigned to a referee in bankruptcy, who conducted the proceedings but stayed the issuance of a discharge pending disposition of this appeal (App. 9–10).

attached to a legislatively created benefit in the social and economic sphere, the appropriate standard of review is simply whether the classification has some reasonable basis.

The Bankruptcy Act was enacted by Congress pursuant to its plenary power over bankruptcy. The provision for a voluntary petition for a discharge in bankruptcy was designed to facilitate the operation of the Bankruptcy Act and to give debtors economic assistance. The legislation is akin to similar legislation in the social and economic sphere. Accordingly, the fee provisions do not violate the Fifth Amendment unless they have no reasonable basis.

B. The district court implicitly recognized, as have other courts, that is is reasonable for Congress to impose a minimal fee to cover the cost of processing a debtor's application for a discharge. Moreover, Congress has demonstrated a particular concern for indigent debtors by permitting them to file petitions without payment of the fee, thereby obtaining relief from creditor harrassment and preserving assets acquired after filing the petition, while allowing up to nine months to pay the $50 fee. The provisions were the product of experience under an earlier statute which demonstrated that many pauper petitions involved a misstatement of the debtor's financial condition or that given a reasonable period of time most assetless debtors could pay the fee. The provision is reasonable and does not deny an indigent debtor equal protection.

C. The district court incorrectly relied on *Boddie* v. *Connecticut*, 401 U.S. 371, in striking down the fee

requirement. In *Boddie,* this Court held unconstitutional, as applied to an indigent, a State requirement that filing fees be paid before a divorce suit could be instituted. It reasoned that since the state compelled those seeking to dissolve their marriages to resort to judicial proceedings, they were deemed to be in the same position as defendants who are compelled by law to defend their rights in court; therefore, they could not be deprived because of indigency of a full opportunity to be heard on their claimed right to a dissolution of "a fundamental human relationship" (401 U.S. at 383).

Where, however, as here, the debtor is not legally compelled to resort to the judicial process but merely selects that method as the means of terminating a debtor-creditor relationship, Congress may impose conditions reasonably related to a legitimate legislative purpose even when, as a result, "some are denied access" to the judicial process. *Boddie* v. *Connecticut, supra,* 401 U.S. at 376. Moreover, the right to a discharge in bankruptcy is not as fundamental as the right to a divorce involved in *Boddie.*

II

The district court correctly held that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), is inapplicable to bankruptcy proceedings. Despite the existence of a general federal *in forma pauperis* statute when the bankruptcy statute was enacted in 1898, Congress wrote a specific provision for pauper petitions into the Bankruptcy Act. The legislative history surrounding the repeal of that provision in 1946,

and the express requirement in the Bankruptcy Act that fees be paid prior to discharge, even if in installments, shows that Congress did not intend the general *in forma pauperis* statute to apply to bankruptcy proceedings.

ARGUMENT

I. THE $50 FILING FEE REQUIREMENT OF THE BANKRUPTCY ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Prior to 1946, the administration of the bankruptcy laws was financed by a fee system under which each referee met the expenses of his office and obtained his compensation out of the fees and charges he collected. The Bankruptcy Act permitted a debtor to file a petition in bankruptcy and obtain a discharge without paying any fees, if he filed an affidavit that he was unable to pay them. Over the years, however, there developed a "practice" by referees of permitting such petitions to be filed without payment, but then insisting and obtaining the payment of the fees, often in installments, before granting a discharge. S. Rep. No. 959, 79th Cong., 2d Sess., p. 2; H. Rep. No. 1037, 79th Cong., 1st Sess., p. 6.

In 1946 Congress abolished these "pauper petitions" and provided, "in lieu of the present widespread practice of demanding payment ultimately" (S. Rep. No. 959, *supra,* p. 7; H. Rep. No. 1037, *supra,* p. 6), for the "creation of a national expense fund, [which] will put the financing upon a national basis designed to be self-sustaining as under the present act (S. Rep. No. 959, *supra,* p. 2). The legislation included a new schedule of uniform bankruptcy fees and charges created separate

referees' salary and expense funds in the Treasury, into which the fees and charges would be paid.[4] It also permitted fees to be "paid in installments if so authorized by General Order of the Supreme Court of the United States" (11 U.S.C. 68(a)).

The latter provision was implemented in *General Order in Bankruptcy* No. 35(4), which provides that a voluntary petition in bankruptcy may be filed without payment of the filing fee if the petition is accompanied by an affidavit of indigency setting forth the terms upon which the bankrupt proposes to pay the fee.[5] The General Order further requires that, following the first meeting of creditors, the court shall enter an order fixing the amount and date of payment of each installment. The fee must be paid within six months unless extended for cause for an additional three months.

Since 1967, the Bankruptcy Act has required the payment of three separate fees, aggregating $50: $37 to the referees' salary and expense fund, Section 40(c)(1), 11 U.S.C. 68(c)(1); $10 for the compensation of the trustee, Section 48(c), 11 U.S.C. 76(c); and $3 to the clerk of the court as a filing fee, Section 52(a), 11 U.S.C. 80(a). If paid in installments over a six-month period, the fees amount to $1.92 per week; if extended to nine months upon a showing of cause, the fee is $1.28 per week.

The district court held that these fee provisions, as applied to respondent (whose financial situation, it

[4] The separate funds were consolidated in 1952. P.L. 457, 82d Cong., 2d Sess., 66 Stat. 438.

[5] *Amendments of General Orders in Bankruptcy*, 331 U.S. 873, 876.

believed, made him indigent, J.S. App. A, 12–13, 22), violated his "Fifth Amendment right of due process, including equal protection" (*id.*, 21). The court held that, since access to the bankruptcy court involves "a fundamental interest," the constitutionality of conditioning such access upon the payment of the $50 fee depends upon whether the requirement promotes a "compelling government interest" (*id.*, 24–25); it ruled that "the Government's fiscal interest in supporting the bankruptcy system" (*id.*, 23) does not satisfy that standard.

The basic error of the district court was its conclusion that the $50 filing fee is constitutional only if it is justified by "a compelling government interest." Although the "compelling governmental interest" standard is significant in testing the constitutionality of "otherwise valid government regulation" that "impinge[s] upon activity protected by the First Amendment" or upon other fundamental constitutional rights, it is now settled that government "regulation in the social and economic field" is valid "[i]f the classification has some 'reasonable basis'" (*Dandridge* v. *Williams*, 397 U.S. 471, 484–485; *Richardson* v. *Belcher*, 404 U.S. 78, 81).

Bankruptcy administration does not involve a regulation which impinges upon a fundamental right, but is akin to legislation in "the social and economic field." The $50 fee is constitutional because it has a reasonable basis: it reflects the valid Congressional purpose of making the administration of the Bankruptcy Act, as far as possible, financially self-sufficient.

A. THE CONSTITUTIONALITY OF THE $50 FILING FEE DEPENDS UPON WHETHER IT HAS A REASONABLE BASIS AND NOT UPON WHETHER IT IS JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

1. While the Fifth Amendment does not contain an equal protection clause, it forbids discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 499; *Schneider* v. *Rusk,* 377 U.S. 163, 168; *Shapiro* v. *Thompson,* 394 U.S. 618, 642. The determination whether the discriminatory aspect of legislation violates the Fifth Amendment depends largely upon the nature of the legislation and the effect which a challenged classification may have on the exercise of fundamental constitutional rights.

Where Congress has legislated in the social and economic sphere, classifications conditioning the right of an individual to obtain statutory benefits will be sustained "unless the statute manifests a patently arbitrary classification, utterly lacking rational justification." *Fleming* v. *Nestor,* 363 U.S. 603, 611; *Dandridge* v. *Williams,* 397 U.S. at 485; *Richardson* v. *Belcher,* 404 U.S. 78, 81. Where, however, the classification tends to discourage or infringe upon the exercise of a fundamental constitutional right, the classification can be justified only upon a showing of a "compelling government interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 638; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663; *Bullock* v. *Carter,* No. 405 U.S. 134.[6]

[6] Also requiring justification by a showing of a "compelling government interest" are those classifications involving so-called "suspect criteria, such as race, nationality and alienage." *Graham* v. *Richardson,* 403 U.S. 367, 375. This special category

The district court's use of the "compelling interest" standard, in reliance upon *Shapiro* v. *Thompson*, 394 U.S. 618, in determining the constitutionality of the $50 bankruptcy filing fee was unwarranted. *Shapiro* v. *Thompson* involved the validity of legislation of several States and of the District of Columbia, which denied welfare assistance to residents who met all other eligibility requirements except that they had not resided within the particular jurisdiction for at least a year. The purpose of the classification based on duration of residence was to discourage migration by indigent persons into the States and the District of Columbia (394 U.S. at 628). The Court held that it was not enough that there was a rational relationship between the classification and the permissible objects of the legislation because the classification infringed

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is rooted in the history of the Equal Protection Clause of the Fourteenth Amendment. As the Court observed in *McLaughlan* v. *Florida*, 379 U.S. 184, 189–192, "classifications based upon race must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. This strong policy renders racial classifications 'constitutionally suspect' * * * and subject to the most rigid scrutiny." See also *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 682, n. 3 (Harlan, J. dissenting). While there are dicta in *McDonald* v. *Board of Elections*, 394 U.S. 802, 807, to the effect that classifications based on wealth as well as those based on race are "suspect", no case has applied the compelling interest standard to classifications, other than those involving "race, nationality and alienage," where the classification did not infringe upon a fundamental constitutional right. Cf. *James* v. *Valtierra*, 402 U.S. 137, which upheld what the dissenting opinion described as "an explicit classification on the basis of property" (402 U.S. 144–45) similar to that which had been al... when the classification was based on race (*Hunter* v. *Erickson*, 393 U.S. 385).

upon the "constitutional right to travel from one State to another" (394 U.S. at 630, quoting from *United States* v. *Guest,* 383 U.S. 745, 757–759).

Other cases that have applied the "compelling interest" test similarly involved restrictions upon basic constitutional rights. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 670, invalidated a poll tax which infringed the right to vote, a right "too precious, too fundamental to be so burdened." *Bullock* v. *Carter, supra,* struck down a prohibitively high filing fee intended to reimburse the state for the cost of conducting a primary election; the Court held that the requirement infringed the right to hold public office and denied "voters the opportunity to vote for candidates of their choice" (405 U.S. at 149). *Smith* v. *Bennett,* 365 U.S. 708, 712, condemned a court filing fee which infringed upon the right of a prisoner to file a petition for a writ of habeas corpus, a remedy "considered by the Founders as the highest safeguard of liberty" and protected by Article I, § 9 of the Constitution.[7] See also, *Graham* v. *Richardson,* 403 U.S. 365, 375; *Dunn* v. *Blumstien,* No. 70–13, decided March 21, 1972.

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[7] The decision in *Smith* v. *Bennett* is one of a series of holdings in cases involving the rights of indigent defendants in criminal proceedings. Relying upon the Due Process Clause as well as the Equal Protection Clause, these cases hold that persons compelled by the State to defend their life and liberty in criminal proceedings must be accorded equal access to remedies afforded by the State to non-indigents in the same situation. *Griffin* v. *Illinois,* 351 U.S. 12, 18; *Douglas* v. *California,* 372 U.S. 353; *Draper* v. *Washington,* 372 U.S. 487; *Lane* v. *Brown,* 372 U.S. 477; *Eskridge* v. *Washington,* 357 U.S. 214.

The requirement in the Bankruptcy Act that a bankrupt must pay a $50 fee in order to obtain a discharge—although disfavoring indigents—does not infringe upon any of their fundamental constitutional rights. There is no constitutional right to obtain a discharge of one's debts in bankruptcy. Article I, Section 8, Clause 4 of the Constitution merely authorizes Congress "to establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." The right of a debtor to file a voluntary petition in bankruptcy and obtain a discharge of his debts was unknown at the time of the adoption of the Constitution. Indeed, prior to the present Bankruptcy Act, passed in 1898, the nation was without a federal bankruptcy law except for three short periods.[8]

The discharge of a bankrupt's debt was initially provided as a means of inducing bankrupts to make full disclosure and delivery of their assets. "The later development of the discharge represents an independent though not unrelated public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse" (MacLachlan, *Bankruptcy,* 88). The concept of a discharge thus resulted from a legislative determination to provide a particu-

[8] An early Act, which did not permit voluntary petitions and conditioned discharge on the consent of creditors, was passed in 1800 and repealed in 1803. 2 Stat. 19, c. 19; 2 Stat. 248, c. 6. A second Act permitting voluntary bankruptcies was passed in 1841 and repealed in 1843. 5 Stat. 440, c. 9; 5 Stat. 614, c. 82. A third Act was passed in 1867 and repealed in 1878. 14 Stat. 517, c. 176; 20 Stat. 99, c. 160. The unrestricted use of voluntary petitions was authorized only after it became apparent that the restrictions on such petitions were easily evaded by collusion between debtors and friendly creditors. MacLachlan, *Bankruptcy*, 88.

lar type of financial aid to debtors. The "fundamental interest" which the district court perceived in the right to obtain a discharge in bankruptcy involves only a legislatively created benefit. See *In re Garland*, 428 F. 2d 1185, 1188 (C.A. 1), certiorari denied, 402 U.S. 966; cf. *Boyden* v. *Commissioner of Patients*, 441 F. 2d 1041 (C.A.D.C.), certiorari denied, 404 U.S. 842.

In any event, the decisions of this Court make clear that Congress has the power to attach reasonable conditions to statutorily-created benefits and that no compelling interest need be shown to justify such conditions regardless of the significance of the benefit accorded.* Particularly apposite here is *Dandridge* v. *Willams*, 397 U.S 471, which involved the validity of a State statute limiting the amount any single family could receive in welfare benefits. Although, unlike

* The fact that Congress delegated to the district court supervision over the non-adversary proceedings by which petitions for a discharge are processed, does not, as the court below suggested, convert a statutory privilege, into a fundamental constitutional right of access to a court. Surely the problem presented here would be no different if Congress had simply delegated the responsibility for the administration of the Bankruptcy Act to an administrative agency. Compare *Levy* v. *Louisiana*, 391 U.S. 68, with *Weber* v. *Aetna Casualty Co.*, No. 70-5112, decided April 24, 1972. The decisions of this Court involving limitations placed upon the right of individuals to assert legal claims have always turned on whether the restrictions imposed were rationally related to a legitimate legislative purpose. *Silver* v. *Silver*, 280 U.S. 117; *Levy*. v. *Louisiana*, 391 U.S. 68; *Glona* v. *American Guaranty Liability Co.*, 391 U.S. 73; *Cohen* v. *Beneficial Finance Corp.*, 337 U.S. 541; cf. *W. B. Worthhen Co.* v. *Thomas*, 292 U.S. 426. The restrictions were never viewed as limitations upon a fundamental right of access to the court necessitating a showing of a compelling government interest. Only a rational basis for the classifications was required. Cf. *Labine* v. *Vincent*, 401 U.S. 532.

Shapiro v. *Thompson, supra,* the limitation in *Dandridge* did not discourage or infringe upon the exercise of any constitutional right, it was contended that welfare payments were so important to the recipient that the limitation could be sustained only upon a showing of a "compelling government interest." While recognizing that the welfare benefits "involved the most basic economic needs of impoverished individuals," the Court nevertheless declined to apply that test in determining the validity of the statute under the Equal Protection Clause, and instead upheld the statute because it had a "reasonable basis" (397 U.S. at 485). The Court said (*ibid.*):

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. * * *[10]

Similarly in *Richardson* v. *Belcher, supra,* the Court sustained the provision of the Social Security Act that requires a reduction in benefits to reflect workmen's compensation payments. The Court held that there was a "rational basis" for the classification, which it stated is the governing standard "in the

[10] The Court distinguished *Shapiro* v. *Thompson, supra,* on the ground that the legislation there involved "interference with the constitutionally protected freedom of interstate travel." 397 U.S. at 484, n. 16.

area of social welfare" legislation for determining its constitutionality under Equal Protection standards (404 U.S. 81, 82). See also, *Lindsey* v. *Normet,* 405 U.S. U.S. 56, 73–74; *Jefferson* v. *Hackney,* No. 70–564, decided May 30, 1972.

The right of an assetless debtor to obtain a discharge in bankruptcy hardly approaches in significance or importance the benefits involved in cases such as *Dandridge* v. *Williams,* supra, nor does it involve an interest by the recipient of a benefit as substantial as that in *Richardson v. Belcher, supra.* The standards applied in those cases are applicable here. See, *In re Garland, supra,* 428 F. 2d at 1188.

B. THE $50 FEE REQUIREMENT HAS A REASONABLE BASIS AND DOES NOT INVOLVE ANY INVIDIOUS DISCRIMINATION AGAINST INDIGENTS

The plenary power over the subject of bankruptcy, which Article I, Section 8 of the Constitution gives Congress, *Kalb* v. *Feuerstein,* 308 U.S. 433, 438–39, permits Congress to "embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system." *United States* v. *Fox,* 95 U.S. 670, 672; see *Wright* v. *Union Central Insurance Co.,* 304 U.S. 502, 513–514; *Hanover National Bank* v. *Moyses,* 186 U.S. 181. Congress has the power to determine whether or not there shall be bankruptcy laws, to limit the right to seek bankruptcy to particular classes of persons, and to "prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law." *Hanover National Bank* v. *Moyses, supra,* 186 U.S. at 192; cf. *Continental Illinois Bank* v. *Chicago, Rock Island & Pacific Railway Co.,* 294 U.S.

648, 669–671; *Kuehner* v. *Irving Trust Co.*, 299 .US. 445.

Congress had a reasonable basis for requiring the payment of the $50 fee as a condition of obtaining a discharge in bankruptcy. The requirement was imposed against the background of the practice under which referees in bankruptcy, whose compensation and expenses were paid out of the fees they received, accepted so-called "pauper" petitions without the payment of any fees, but subsequently insisted upon their payment before they would grant a discharge. See *supra*, pp. 7–9. The fact that so many allegedly indigent bankrupts actually were able to find the money to pay the fees indicated either that their affidavits of indigency were false or that they subsequently became able to pay the fee once the petition in bankruptcy had been filed.[11]

In the 1946 amendments to the Bankruptcy Act, Congress determined to end these practices that had

[11] In several recent cases involving challenges to the constitutionality of the bankruptcy fee provisions, the petitioners—notwithstanding affidavits of poverty—have been able to pay the fees. In *In re Miller*, the district court upheld the fee requirement. On appeal to the Sixth Circuit, No. 20,059, that court remanded for further findings on indigency; the district court then found that, notwithstanding the affidavit of indigency, the petitioner could pay the fees. *In re Miller*, E. D. Mich., No. 71-8002, decided December 16, 1971. The Administrative Office of the United States Courts has advised us of two other instances in which payment was made under similar circumstances despite the filing of affidavits of indigency. In *In re Morris*, D. Ore., No. B69-2537, the petitioner paid her fee and dismissed her appeal after the referee rejected her challenge to the fee; and *In re Hickey*, N.D. Miss., Civil No. DBk71-52, likewise became moot when the petitioner obtained a job and paid the filing fees.

previously existed in the use of the pauper petitions and to make the financing of the administration of the bankruptcy laws "self-sustaining." S. Rep. No. 959, 79th Cong., 2d Sess., p. 2. In addition to abolishing the pauper petitions, Congress provided two new sources of revenue for administering the bankruptcy laws: the payment of fixed fees for every bankruptcy petition filed, and the payment of a fixed percentage of all distributable assets. Congress thus determined that the expenses of bankruptcy administration should be borne by those who use the system, rather than by the public at large. See H. Rep. No. 1037, 79th Cong., 1st Sess., pp. 4, 5–6.[12]

The district court in the present case—as well as the two other courts that have invalidated the fee as a condition to discharge—have recognized the propriety of requiring the payment of the fee. For they have provided that the $50 remains a debt of the bankrupt that is not discharged and which must be paid if and when the bankrupt obtains the funds. (J.S. App. A, p. 23); *In re Smith,* 323 F. Supp. 1082 (D. Col.) *Application of Ottman,* 336 F Supp. 746 (E.D. Wisc.)). But the deter-

[12] This decision to charge the users of the system continued a policy that had been reflected in the several bankruptcy statutes enacted since 1800. The first national bankruptcy statute was enacted in 1800, and provided only for involuntary proceedings. The fees involved were paid by the bankrupt's creditors, 2 Stat. 19, c. 19. In 1841, a new bankruptcy statute authorized the district courts to prescribe the charges for the services provided. Act of 1841, ch. 9, § 6, 5 Stat. 440. The Act of 1867 provided for certain fees and gave this Court the authority to establish others. Act of 1867, ch. 176, §§ 10, 47, 14 Stat. 517. The tests of the older statutes are set forth in 10 *Collier on Bankruptcy,* Appendix, p. 1671.

mination of the manner in which a particular legislative policy is to be implemented—here the payment of a fee as a condition to discharge—is for the Congress and not the courts to make.

The provisions for the payment of the $50 fee, as implemented by General Order in Bankruptcy, No. 35(4), are reasonable. An indigent debtor is permitted to file his petition in bankruptcy without payment of any fee. He therefore obtains the advantage of insulating from his creditors assets acquired from the date of the filing of the petition (11 U.S.C. 110),[13] while being allowed up to nine months to obtain the money to pay the fee. During this period he is also effectively freed from creditor harrassment (MacLachlan, *Bankruptcy*, 98).[14] Congress could properly

[13] The only property acquired after the filing of the petition to which the trustee takes title is that acquired by device, bequest or inheritance within six months after the filing of the petition, and property in which the bankrupt had at the time of filing an estate or interest by the entirety and which within six months of filing becomes transferable in whole or in part solely by the bankrupt. 11 U.S.C. 110(a); MacLachlan, *Bankruptcy*, 178–81.

[14] Pursuant to 11 U.S.C. 29(a) the bankrupt may obtain a stay of all actions pending at the time of the filing of the petition which seek to enforce claims which would be subject to discharge. The provision has been held applicable to supplementary proceedings on a judgment, levy of execution, garnishment, or proceedings to arrest a bankrupt on civil process out of a state court arising on a dischargeable claim (1A Collier, *Bankruptcy*, 11.03, p. 1143, 11–45 and cases cited). The district court is also empowered to issue similar stays with respect to lawsuits commenced after the filing of the petition (11 U.S.C. 11(a)(15); see 1 Collier, *Bankruptcy*, 2.62, p. 338–341).

conclude that if a debtor could not forsee any possibility of obtaining $50 in that period, he could simply delay filing the petition until his prospects for future earnings increased and the discharge becomes meaningful. The procedure reflects a concern for the rights of assetless debtors, while at the same time furthers a reasonable legislative policy. Cf. *Bullock* v. *Carter, supra,* 405 U.S. at 149. This is not invidious discrimination. See, Michelman, *The 1966 Supreme Court Term, Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 Harv. L. Rev. 7, 19–20.

The elimination of the $50 filing fee for indigents would substantially eliminate any possibility of accomplishing the Congressional purpose, which underlay the legislative determination to adopt the fee system in 1946, of making the administration of the bankruptcy laws financially self-sufficient. See *supra,* pp. 7–9. The most recent statistics show that of the 169,500 non-business bankruptcies terminated in 1969, more than 64 percent (107,481) were cases in which the bankrupt had no non-exempt assets but ultimately paid the fee. Administrative Office of the United States Courts, *Tables of Bankruptcy Statistics* (1969). The loss to the Referees' Salary and Expense Fund if filing fees cannot be required for indigents has been estimated at $3 million annually (see *In re Garland, supra,* 428 F. 2d at 1188). Even if that figure were actually somewhat lower, it is clear that the Congressional objective of making the bankruptcy system self-supporting would be defeated.[15]

[15] The fact that rising administrative costs and referee salaries have resulted in increasing operating deficits in the bankruptcy

C. *BODDIE* V. *CONNECTICUT* IS INAPPLICABLE

The district court relied heavily upon *Boddie* v. *Connecticut,* 401 U.S. 371, in holding the $50 filing fee requirement unconstitutional. *Boddie* held unconstitutional, under the Due Process Clause, a Connecticut statute requiring the payment of a filing fee in order to institute a divorce action, as applied to indigents unable to pay the fee. In his motion to affirm, appellee relies almost entirely on *Boddie,* which he interprets as establishing that the $50 filing fee violates the Due Process Clause; he makes no contention that the requirement denies him equal protection.

Contrary to the views of the district court and appellee, we submit that *Boddie* does not control this case and that neither its holding nor its reasoning invalidates the $50 filing fee requirement in bankruptcy.

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system (J.S. App. A 23–24), merely serves to emphasize rather than diminish the importance of maintaining a source of revenue which Congress deemed significant to the fiscal integrity of the bankruptcy system. Whether the fee should be totally eliminated or whether it should be retained along with a continuing subsidy from the general revenues is a decision Congress must make. The Administrative Office of the United States Courts recommended, in March 1969, that the self-financing aspect of the bankruptcy law be abolished. Legislation to that effect was introduced in the 91st Congress, 1st Session (S. 1394; H.R. 4816) but did not pass. S. 1394 passed the Senate in the current session and is pending in the House. The legislation is briefly discussed in S. Rep. No. 612, 92d Cong., 2d Sess. Congress has also recently created a Commission on the Bankruptcy Laws of the United States to investigate the operation of the bankruptcy system. P.L. 91–354, 91st Cong., 2d Sess., 84 Stat. 468. The report of that commission is due in June, 1973. See S.J. Res. 190, 92d Cong. 2d Sess.

The plaintiffs in *Boddie,* who were forced by the State to resort to its courts in order to obtain a divorce, were found to be in the same position and entitled to the same due process rights accorded defendants in civil cases who are likewise compelled to defend their legal rights in court. Drawing upon principles applicable to the rights of such defendants, the Court held that "the state's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of sufficient countervailing justification for the State's action, a denial of due process" (401 U.S. at 380).

The justification offered for the filing fee in *Boddie* was that it was necessary to effectuate a policy against frivolous litigation and to cover the costs of the proceeding. The Court found that the filing fee did not have any significant relation to discouraging frivolous lawsuits and that other means were available to accomplish that objective. Relying upon *Griffin* v. *Illinois,* 351 U.S. 12, which struck down a limitation on the right of an indigent criminal defendant to equal access to the remedies made available by the State, the Court held that the State's interest in resource allocation and cost recoupment was insufficient to justify the limitation (401 U.S. at 382).

The Court stated, however (401 U.S. at 382–383):

> * * * We do not decide that access for all individuals to the courts is a right that is, in all

> circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

The discharge of a person's debts through bankruptcy cannot be equated to a divorce proceeding. Unlike the dissolution of a marriage, which may be obtained only through a judicial proceeding, a discharge in bankruptcy is only one of the ways of dissolving the debtor-creditor relationship. The parties may agree on a method of repaying or compromising the debt or the creditor may discharge the obligation formally or simply by not pursuing his legal remedies until they become time-barred. Debts thus may be discharged without invoking bankruptcy proceeding and, unlike the situation with respect to a marriage, the government has not "pre-empted the right to dissolve this legal relationship without affording all citizens access to the means it has presented for so doing" (401 U.S. at 382).

It has been suggested, however, that as a practical matter, resolution of a particular dispute by the par-

ties themselves may be impossible and that under those circumstances "the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force." Mr. Justice Black, dissenting from the denial of certiorari in *Meltzer* v. *C. Buck LeCraw & Co.*, 402 U.S. 954, 957; see, also Mr. Justice Brennan, dissenting in *Boddie* v. *Connecticut, supra,* 401 U.S. at 387. While this may be true, we submit that the distinction between cases in which litigants are forced by the State to have their rights resolved through the judicial process and cases in which they simply choose that route to resolve irreconcilable disputes is at least sufficient to warrant a different standard in reviewing the conditions placed upon the ~~existence~~ exercise of legislatively-created rights.

Where the State does not require a party to invoke the judicial process but merely makes available a forum for the resolution of a dispute, it can attach reasonable conditions even though they have the effect of denying some persons access to the courts. *Boddie* v. *Connecticut, supra,* 402 U.S. at 376. In *Cohen* v. *Beneficial Finance Corp.*, 337 U.S. 541, the Court upheld a state law requiring a shareholder who owned less than 5 percent of the corporation's stock or whose stock was worth less than $50,000, to post security for costs before he could bring a stockholder's derivative suit. The Court stated (337 U.S. at 552):

> It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for

the payment of any kind of costs, or the necessity for bearing any kind of expenses of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.

The Court recently distinguished *Cohen* on grounds that recognized the power of the legislatures to impose reasonable conditions upon someone seeking to invoke the judicial process to settle a dispute. In *Lindsey* v. *Normet, supra,* 405 U.S. at 74–79, the Court struck down an Oregon statute requiring that tenants seeking to appeal eviction orders post a bond equivalent to twice the rental value of the premises from the commencement of the action until final judgment, *in addition* to the ordinary appeal bond. The Court held that the requirement for a double bond was an "arbitrary" device which made it impossible for poor defendants to appeal "no matter how meritorious their cases may be" (405 U.S. at 79). It distinguished *Cohen* on the ground that "the security requirement there applied to a *plaintiff*" and had a reasonable basis (405 U.S. at 79, emphasis in original). Cf. *Boddie* v. *Connecticut, supra,* 401 U.S. 381, n. 9; *Chidsey* v. *Guerin,* 443 F. 2d 584 (C.A. 6).

Moreover, the right to a discharge in bankruptcy, important though it may be, does not involve an interest as fundamental as that involved in *Boddie.* The Court there indicated that it was significant that the State had pre-empted the right to dissolve the "fundamental human relationship" of marriage (401 U.S. at

383). But a discharge of the debts of an assetless debtor is not of the same level of fundamental importance as a divorce, which involves at the very least the right of the parties to remarry (cf. *Loving* v. *Virginia*, 388 U.S. 1, 12). As the Court of Appeals for the First Circuit observed *In re Garland*, 428 F. 2d at 1188:

> The primary question must be why an individual admitting no assets has need for a discharge. If he has nothing, or if whatever he has is exempt under 11 U.S.C. § 24, it would seem that his creditors would find it pointless to pursue him. If they should pursue, one would wonder what the debtor could have to be concerned about. We can think of only two classes of seemingly assetless persons who might want a discharge: those who in fact have assets, but hope to conceal them, and those who have none, but, as present petitioners claim for themselves, expect future assets, and wish to be rid of their creditors first. The first category deserves, of course, no consideration. We do not think the claim of the second so compelling that they must be constitutionally entitled to a free discharge.

Ordinarily the denial of a petition for certiorari imports nothing with respect to the merits of the decision denied review. But the denial of certiorari in *Garland*, coming only two months after the decision in *Boddie* and in light of the strong dissenting opinions of Mr. Justice Black and Mr. Justice Douglas, both of whom would have reversed *Garland* on the authority of *Boddie* (402 U.S. 954, 960), suggests that the Court did not regard *Boddie* as extending to invalidate the $50 filing fee requirement in bankruptcy. This conclusion is in accord with the state-

ment in *Boddie,* quoted *supra,* pp. 22–23, that "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment * * *." Cf. *Frederick* v. *Schwartz,* 402 U.S. 937, vacating and remanding for reconsideration in light of *Boddie* an order of a three-judge court upholding a filing fee in cases involving appeals from administrative agency decisions.

II. THE FEDERAL IN FORMA PAUPERIS STATUTE, 28 U.S.C. 1915(a), IS INAPPLICABLE IN BANKRUPTCY PROCEEDINGS

Appellee contended below and in his motion to affirm (p. 2) that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), is applicable to proceedings in bankruptcy and that it entitles him to file his petition and obtain a discharge without payment of costs. The district court correctly rejected this argument.

The Bankruptcy Act not only makes payment of the fee a condition to discharge (11 U.S.C. 32(b)(2) and 32(c)(8)), but Congress in the 1946 Amendments eliminated the pauper filings which were formerly permitted under Section 51(2) of the Bankruptcy Act of 1898, and substituted an installment method of payment for indigent petitioners (11 U.S.C. 68(c)(1)).[16] The legislative history of the amended statute shows that Congress intended to "abolish the [so-called] pauper petitions" and "to provide for installment payments in meritorious cases." S. Rep. No. 959, *supra,* at p. 7.

[16] Despite the existence of a general federal *in forma pauperis* statute (27 Stat. 252 (1892)), Congress thought it necessary to write a specific provision for pauper petitions into the Bankruptcy Act of 1898.

In the light of this clear and explicit Congressional purpose to eliminate pauper petitions, Congress showed that it did not intend to allow bankrupts to continue to follow that terminated practice by proceeding under the general *in forma pauperis* statute. See *In re Garland, supra,* 428 F. 2d at 1186–1187; *In re Smith,* 323 F. Supp. 1082, 1084-1085 (D. Col.); *Application of Ottman,* 336 F. Supp. 746 (E.D. Wisc.).

CONCLUSION

For the foregoing reasons, the judgment of the district court holding the mandatory filing fee provisions of the Bankruptcy Act unconstitutional as applied should be reversed.

Respectfully submitted.

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JUNE 1972.

APPENDIX

The Bankruptcy Act, 11 U.S.C. 1 *et seq.*, provides in relevant part:

Section 14(b), 11 U.S.C. 32(b):

(b)(1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge * * * which * * * shall be not less than thirty days * * * after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94(d) of this title * * * [If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the court may, upon its own motion or upon motion of the receiver, trustee, a creditor, or any other party in interest or for other cause shown, extend the time for filing such objections.]

(2) Upon the expiration of the time fixed in the order * * * or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

Section 14(c)(8), 11 U.S.C. 32(c)(8):

The court shall grant the discharge unless satisfied that the bankrupt has * * * (8) has failed to pay the filing fees required to be paid by this title in full * * *.

Section 40(c)(1), 11 U.S.C. 68(c)(1):

(c)(1) Except as otherwise provided in this title, there shall be deposited with the clerk, at the time the petition is filed in each case, and at the time an ancillary proceeding is instituted, $37 for each estate for the referees' salary and expense fund, as herein below established: *Provided, however,* That in cases of voluntary bankruptcy such fee, as well as the filing fees of the clerk and trustee, may be paid in installments, if so authorized by General Order of the Supreme Court of the United States.

Section 48(c), 11 U.S.C. 76(c):

The compensation of trustees for their services, payable after they are rendered, shall be a fee of $10 for each estate, deposited with the clerk at the time the petition is filed in each case, except where installment payments may be authorized pursuant to section 68 of this title * * *.

Section 52(a), 11 U.S.C. 80(a):

(a) Clerks shall charge and collect for their services to each estate, whether in a court of primary or ancillary jurisdiction, a filing fee of $3. The clerk may collect this amount in installments when such installment payments have been authorized by General Order of the Supreme Court of the United States.

Section 59(g), 11 U.S.C. 95(g):

(g) A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in section 94 of this title, and to that end the court shall, upon entertaining an application for dismissal, require the bankruptcy to file a list, under oath, of all his creditors, with their addresses, shall cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information, and belief: *Provided, however,* That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

Supreme Court *General Order in Bankruptcy* No. 35(4) provides:

(4) The petition in a voluntary proceeding under Chapters I to VII or Chapter XIII of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth

the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three mnths.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court may dismiss the proceeding for failure to pay costs as provided in Section 59(g) of the Act. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any, in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-749

UNITED STATES OF AMERICA,
Appellant,

v.

ROBERT WILLIAM KRAS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the district court (J.S. App. A pp. 11-26) is reported at 331 F. Supp. 1207.

JURISDICTION

The judgment of the district court declaring unconstitutional, as applied, the filing fee requirement of the

federal bankruptcy law [1] was entered on September 13, 1971 (J.S. App. A. p. 11). A notice of appeal was filed on October 8, 1971 (J.S. App. B. p. 27) and probable jurisdiction was noted on February 22, 1972 (App. 11; 405 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. §1252.

QUESTIONS PRESENTED

1. Whether the provisions of the federal bankruptcy law requiring the payment of a filing fee deny appellee a procedural due process hearing in violation of his Fifth Amendment Due Process rights.

2. Whether the provisions of the federal bankruptcy law requiring the payment of a filing fee deny this indigent bankrupt access to court in violation of his Fifth Amendment rights.

STATUTE AND ORDER INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's General Order in Bankruptcy No. 35, are set forth in the appellant's appendix at pp. 29-32.

STATEMENT

In order that the issues may be seen in proper perspective, the appellee submits the following detailed presentation of the facts:

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[1] The relevant provisions of the bankruptcy law are set forth in the appendix at pp. 29-32 in the Government's brief.

On May 28, 1971 Robert William Kras, appellee, sought to file a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York. Accompanying the petition was an affidavit describing his financial plight. Mr. Kras resides with his wife, his two young children, his mother and her young child in a 2½ room apartment. His youngest child is afflicted with cystic fibrosis. He supports them solely on a total semi-monthly public assistance allowance of $183. Rent consumes $102 monthly and the remaining money is expended on day-to-day necessities. Mr. Kras' sole assets are $50 worth of essential household goods[2] and a couch in storage on which payments are owed.

Mr. Kras also detailed the difficulties he has encountered in finding employment. Appellee's last steady job was in 1969 as an insurance agent with Metropolitan Life Insurance Company. He was discharged from Metropolitan in 1969, "because premiums which I had collected were stolen from my home by an intruder and I was unable to make up the amount to Metropolitan" (App. 4).

Since that time Mr. Kras has sought steady employment in New York City and Connecticut, but his efforts to secure employment have been frustrated primarily by the unfavorable references given by Metropolitan to prospective employers. During 1969 and 1970, appellee was only able to obtain odd jobs, from which he earned approximately $600. Appellee's wife was employed until March, 1970, but stopped working when she had a baby. Her time is now devoted to caring for her handicapped son.

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[2] Exempt from distribution in bankruptcy pursuant to 11 U.S.C. §24 and New York Civil Practice Laws and Rules 5205.

Mr. Kras' total indebtedness is $6428.69, of which the claim of Metropolitan Life Insurance Company amounts to $1012.64. In his affidavit Mr. Kras also explained the reason he seeks a bankruptcy discharge at the earliest possible time:

> "I earnestly seek a discharge in bankruptcy of substantial indebtedness in the amount of $6428.69 in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that I get a discharge of my debt to Metropolitan Life Insurance Company soon, because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad references which prevent my getting employment. When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care for my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare (App. pp. 5-6).

Mr. Kras was unable by saving or borrowing to accumulate funds above those required to meet the day-to-day subsistence needs of himself and his family, and the New York City Department of Social Services refused to make an allotment for bankruptcy filing fees. Accordingly, at the time he attempted to file his petition in bankruptcy, Mr. Kras stated that he could neither pay the $50 filing fee in lump sum nor state the terms upon which he could promise to pay in installments (App. 4-6), as required before his petition could be filed (11 U.S.C. §§68(c)(1), 76(c), 80(a); Supreme Court General Order in Bankruptcy No. 35(4)). Mr. Kras' motion for leave to file his petition and proceed in bankruptcy without payment of any of the filing fees (App. 3) was referred to District Judge Travia for determination. See *In re Kras*, 331 F. Supp. 1207, 1208 (E.D.N.Y., Sept. 13, 1971).

By decision and order of September 13, 1971, District Judge Travia held that the filing fee requirement is unconstitutional as applied to Mr. Kras and ordered the bankruptcy petition filed and referred to a referee without Mr. Kras' prepayment of any filing fee. The Court further directed the referee to make provision for the survival of petitioner's obligation to pay the filing fee. *In re Kras,* 331 F. Supp. at 1213. Mr. Kras' petition was referred to Referee Manuel J. Price, who ordered that Mr. Kras be allowed to conduct all necessary bankruptcy proceedings up to but not including actual discharge (App. 9-10). None of Mr. Kras' creditors appeared before the referee at the first and only meeting of creditors to make objections, and, accordingly, only the filing fee requirement presently stands between Mr. Kras and the discharge of all of his scheduled debts.

ARGUMENT

I.

THE FILING FEE REQUIREMENTS OF THE FEDERAL BANKRUPTCY LAW DENIES APPELLEE A PROCEDURAL DUE PROCESS HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), struck down as an unconstitutional infringement upon rights guaranteed by the Due Process Clause of the Fourteenth Amendment a Connecticut statute that foreclosed to an indigent the only available forum capable of effectuating a change of his marital status. The factors considered by the majority of the Court in *Boddie* were the undisputed bona fides of appellants' indigency, their desire to use the judicial process to obtain a divorce, the state monopoly over the relief, the importance of the

interest at stake, and the absence of any countervailing overriding governmental interest.

Here Mr. Kras, appellee, because of his dire indigency is barred by the bankruptcy filing fee requirement from gaining access to the bankruptcy court to have his status changed from that of an harassed debtor to one of an individual unhampered by overwhelming indebtedness.

It is really discernible upon an analysis of this Court's opinion in *Boddie* that the factors underlying *Boddie* are equally present in this case.

A. Bona Fide Claim of Indigency

Mr. Kras stated in his sworn affidavit that all the payments he receives from public assistance are needed to cover his rent and other day-to-day necessities. Appellee further said that there was no way for him to borrow the money. As with the appellants in *Boddie* the welfare income of Mr. Kras and his dependents "barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the court . . . " *Boddie, supra*, 401 U.S. 372-73. The Government has at no point disputed Mr. Kras' statement as to the facts and the extent of his indigency and his inability to pay the filing fee either in lump sum or in installments.[3]

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[3]District Judge Travia concluded that in view of the extreme poverty of Mr. Kras it was unnecessary to even consider whether he need sell any exempt assets to meet the fee requirements or whether there is a constitutional standard for determining indigency. 331 F. Supp. at 1213.

B. Bona Fide Desire By Kras To Be Discharged in Bankruptcy

It is also undisputed that Mr. Kras genuinely wants a discharge in bankruptcy in order to help him gain employment and once employed to use his wages for the benefit of his family instead of having them paid to creditors.

C. Monopoly of Forum Over Relief

The bankruptcy court is the exclusive avenue for obtaining a discharge of indebtedness under the Bankruptcy Act. 11 U.S.C. §11. The Bankruptcy Act is a national act. Congress and the framers of the Constitution intended that all state insolvency laws be supplanted by one uniform set of laws in the hands of one court. See *The Federalist*, No. 42 (Cooke Ed., 1961 at 282, 266-87).

The Government in its brief has attempted to distinguish divorce from bankruptcy on the ground that while a divorce "may be obtained only through a judicial proceeding, a discharge in bankruptcy is only one of the ways of dissolving the debtor-creditor relationship." Brief, p. 23.

Although *Boddie* was decided on the specific facts presented, unquestionably the underlying principles in *Boddie* embrace all situations where, as here, there are no "recognized effective alternatives" (*Boddie*, 401 U.S. at 376) to the judicial proceeding for obtaining the desired relief. Realistically for Mr. Kras and other indigent debtors the bankruptcy court is the only available avenue for emancipation from their crushing indebtedness.

It is unrealistic for the Government to argue that bona fide indigents can effectively resolve their dispute with

their creditors without the benefit of the bankruptcy court. There is no viable alternative to the bankruptcy court for impoverished individuals. They have neither any present funds nor any immediate prospects of future funds that would give them any conceivable leverage or bargaining position in dealing with their creditors. Absent the availability of the relief under the Bankruptcy Act and the enforcement power of the bankruptcy court, these debtors have little chance of working out on their own an arrangement acceptable to their creditors, each of whom is anxious to have his claim satisfied at the expense of the others.

The fact that the United States Congress felt the need to legislate in the debtor-creditor area by creating a statutory vehicle for relieving an individual of overwhelming indebtedness demonstrates the gross inadequacies of private arrangements.

In this case, in particular, it is manifestly absurd to argue that Mr. Kras either can personally solve his dispute with his creditors or can without filing for a bankruptcy discharge wait until he can afford the payment of the fee. Mr. Kras finds himself under unique circumstances that make private negotiation between Mr. Kras and his creditors utterly impossible as a means of relieving him of his indebtedness. It cannot be expected that Metropolitan Life Insurance Company, a major creditor who has questioned the circumstances surrounding the lost premiums and who has therefore given appellee unfavorable references, will drop its claim. As to the other creditors Mr. Kras has simply nothing to offer in return for the abandonment or modification of their claims. Any abandonment or reduction of the claims by the creditors against an assetless debtor would be an act of pure charity by a creditor.

Thus for Mr. Kras and others like him the bankruptcy court proceeding is in reality the "only available one" for securing release from indebtedness. *Boddie, supra,* 401 U.S. at 377.[4]

D. Interest at Stake

The Government also asserts that it is permissible to bar individuals from the opportunity to be heard on their claimed right to a bankruptcy discharge because "the right to a discharge in bankruptcy, important though it may be, does not involve an interest as fundamental as that involved in *Boddie.*" Brief, p. 25.

The Government has misconstrued the root meaning of *Boddie.*

The only novel aspect of this Court's decision in *Boddie* was the recognition that a would-be plaintiff who seeks access to the judicial process to enforce a claimed

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[4]Although substantially abandoning that position in its Brief, the Government in its Jurisdictional Statement (pp. 8-9) implies that there is a constitutionally-significant difference between a federal bankruptcy court and the Connecticut divorce courts. The suggested dichotomy is clearly a false one. The bankruptcy referee is empowered to hear and determine disputes between the bankrupt-debtor and his creditors relating to a transaction which gave rise to a particular indebtedness. 11 U.S.C. §§1(9), 1(10), 1(11), 11, 32, 35(a)(2), 35(a)(4), 35(a)(8), and 35(c)(2). See *Pepper v. Litton,* 308 U.S. 295, 304 (1939); *United States Fidelity & Guaranty Company v. Bray,* 225 U.S. 205, 217 (1912). While it may not be the typical bankruptcy proceeding in which the debtor and his creditors confront each other in an adversary posture, this is no less true of the typical default divorce proceeding, which is not really a resolution of a dispute but merely a legal formulation of an arrangement worked out between parties only nominally in legal conflict with each other.

right where there are no effective alternative means to securing relief is entitled to the full panoply of fundamental due process safeguards which have repeatedly been held by this Court to protect defendants compelled to defend their interests.[5] Once the right to a traditional procedural due process hearing attaches, it is constitutionally impermissible for this Court to establish, as the Government suggests, an arbitrary hierarchy of interests in statutory rights as a sound basis for selectively applying the fundamental principles of due process. As this Court recently noted, "it is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that by its own light are 'necessary'." *Fuentes v. Shevin*, 40 U.S.L.W. 4692, 4699 (1972).

Appellant would have each court, and in every case, weigh the class of action against some elusive yardstick of fundamental rights forever anchored to divorce as the standard for what is fundamental. Even if courts were able to establish with confidence some theoretical order of priorities of interest, they would still be faced with the need for realistic appraisal of the interest at stake for the particular individual. Courts would be forced into deciding whether the interest protected by one contract action is a more significant one than the interests involved in some other contract action. Even more troublesome would be the problem of responsibility for litigating the question of whether a fundamental right is involved. Where the litigant opposing the indigent party is a government, it can be expected that the latter would raise the question in good faith; however, if the party

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[5] See *Fuentes v. Shevin*, 40 U.S.L.W. 4692 (1972); *Boddie v. Connecticut, supra*, 401 U.S. at 378-79, and cases cited.

opposing the indigent is a private litigant, it is not unreasonable to anticipate the raising of the question as part of the general resistance to the indigent's claim.

Accordingly, the Government's suggestion that the courts selectively apply fundamental rights is both practically unworkable[6] and constitutionally indefensible.

In any event, there is no question that appellee's right to a discharge in bankruptcy is a sufficiently important interest both to himself and to society to entitle him to the meaningful hearing traditionally guaranteed by the Due Process Clause.

One of the prime objects and paramount purposes of the Bankruptcy Act is to free the worthy debtor from the burden of unpaid debts. It has repeatedly been recognized by this Court that the substantial and fundamental purpose underlying the bankruptcy law is to give a debtor a "... new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-245 (1934); *Lines v. Frederick*, 400 U.S. 18 (1970).

The purposes and goals of allowing one's debts to be discharged are not confined to economic rehabilitation. There are far-reaching social and psychological benefits encompassed in giving an individual the opportunity to begin afresh by having his failure forgiven and maybe forgotten. He no longer fears creditor harassment, law-

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[6]Cf. *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335, 4339 (1972). "A final compelling reason for rejecting a 'personal liberties' limitation upon Section 1343(3) is the virtual impossibility of applying it." See also *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954 (1971).

suits and wage garnishments.[7] Without a discharge of debts, an individual, like appellee, who finds himself overwhelmed by his debts and harassed by his creditors becomes immobilized. Everywhere he turns his is confronted by failure and frustration. He sees no way to extricate himself from his unfortunate plight. Relief of his debts by a discharge in bankruptcy will result in a change of status from that of a debt-ridden failure to one of a potential rehabilitated and productive member of society. This change of status from an overwhelmed debtor to a potential solvent, useful member of society is of no less importance to Mr. Kras than a divorce is to a person trapped in an unhappy marriage. The substantial importance to the appellee of a discharge in bankruptcy is amply demonstrated by the magnitude and circumstances of his indebtedness and by his concern with relieving the stress of creditor harassment and his desire to make a new start in life. It is also in society's best interest that Mr. Kras become financially solvent rather than wallow in his debts:

> "The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).[8]

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[7] Title II of the Consumer Protection Act, 15 U.S.C. §1671 *et seq.*, prohibits an employer from discharging an employee who is subject to only one wage execution, but does not afford similar protection to the prospective employee or to the employee subject to more than one wage execution.

[8] Society receives no benefit from the continuation of Mr. Kras' status as a public charge. Cf. *Atkins v. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

Mr. Kras receives an additional benefit from an early discharge in bankruptcy. Each time Mr. Kras applies for a job he must overcome a seemingly insurmountable barrier, namely that he is accused through inference and innuendo of being a thief. Since Metropolitan did not appear before the referee to contest the debt, appellee's discharge in bankruptcy will not only erase this debt but hopefully will remove the unwarranted stigma that operates as an albatross around his neck. Although there is no way for Mr. Kras to prevent Metropolitan from giving appellee an unfavorable reference even after he is discharged, the fact that Metropolitan made no attempt to prove fraud and thus have the debt survive a bankruptcy discharge (11 U.S.C. §§35(a)(4) and 35(c)(2)) hopefully will not be without significance to a prospective employer.

E. Overriding Governmental Interests

We regard as frivolous appellant's suggestion that the pure money interest in placing the bankruptcy system on a self-supporting basis[9] can be of sufficient constitutional significance to override Mr. Kras' fundamental due process right to be heard.[10] See *Fuentes v. Shevin*, 40

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[9]It is not unlikely that when Congress amended the Bankruptcy Act in 1946 to abolish the in forma pauperis bankruptcy petition and established in its place the installment payment option it simply overlooked the possibility that an individual like Mr. Kras might be so severely indigent as to be unable to meet the fee requirements on lenient installment terms.

[10]The government has wisely refrained from advancing as justification an interest in discouraging frivolous and fraudulent bankruptcy petitions. There is no connection between a bankruptcy petitioner's ability to pay the filing fee and the seriousness of his motives and it is undisputed that Mr. Kras seeks a discharge in good

U.S.L.W. 4692, 4699 n. 22, 4700 n. 29 (1972); *Stanley v. Illinois*, 40 U.S.L.W. 4371, 4375 (1972); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). See also *Griffin v. Illinois*, 351 U.S. 12 (1956).

In any event the conclusions which the Government draws regarding the impact of the present case upon the financing of the bankruptcy system do not follow from the facts it presents. The government observes that more than 64% (107,481) of the 1969 non-business bankruptcies were cases in which although the bankrupt had no non-exempt assets he was able to pay the filing fee (Brief, p. 20). The power and the authority of the bankruptcy system to continue to collect the filing fees from indigents who, like the 107,481 in 1969 were able to pay them at least in small installments, would be unimpaired by a decision allowing Mr. Kras and similarly situated individuals, who not only have no non-exempt assets but lack sufficient other assets to pay the filing fees even in

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faith. Since no objecting creditor appeared at the first and only meeting of creditors it is clear that but for the filing fee requirement Mr. Kras could obtain an immediate discharge of all his scheduled debts. It also should be noted that the potential for abuse which exists whenever filing fees are waived on the basis of an affidavit of indigency is less in this context because of the referee's on-going inspection of a bankrupt's financial condition than in other areas of civil actions where 28 U.S.C. § 1915 applies. *In re Kras, supra*, 331 F. Supp. at 1213.

small installments, to be discharged without payment of the filing fee.[11] Accordingly, the granting of relief to Mr. Kras will have a minimal impact on the fiscal status of the bankruptcy system,[12] which has been operating at a substantial deficit since 1966.[13]

In sum, upon careful legal analysis of the underlying rationale of this Court's decision in *Boddie*, the conclusion is inescapable that the present case is constitutionally indistinguishable from *Boddie*.[14]

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[11] The Government boldly asserts that $3,000,000 is the measure of the potential monetary loss in allowing indigents generally to avoid paying the filing fees. No attempt is made by the Government to prove that the $3,000,000 figure is in fact the added cost of allowing indigents in Mr. Kras' severe circumstances to avoid the fees.

[12] It is appalling and ironic that the Government in the very proceeding designed to afford some measure of relief insists that Mr. Kras continue living in an intolerable situation.

[13] $4,531,466 in 1970 alone. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics (1970). See *In re Kras, supra*, 331 F. Supp. at 1214.

[14] This same conclusion has been reached by at least nine lower federal courts which have considered the question. *In Matter of Beeman*, Nos. 14810 & 14811 (D. Ct. Conn., May 22, 1972); *In Matter of Smith*, No. 71-B-7497 (N.D. Ill., April 28, 1972); *In Matter of Ripley*, No. Bk71-0-1003 (D. Ct. Neb., Referee Strasheim, April 28, 1972); *In Matter of Shropshire* (N.D. Iowa, March 28, 1972); *Application of Ottman*, 336 F. Supp. 746 (E.D. Wisc., 1972); *In Matter of Passwaters*, Nos. 1P70-B-3697, 8 (S.D. Ind., Nov. 30, 1971); *In Matter of Read*, No. Bk71-826 (W.D.N.Y., Referee McGuire, October 19, 1971); *In re Naron*, 334 F. Supp. 1150 (D.Ct. Ore., 1971); *In re Kras, supra*. But see *In Matter of Partilla*, No. 71-B-380 (S.D.N.Y., Referee, Babitt, Oct. 15, 1971); *In Matter of Malevich*, No. Bk29-71 (D.Ct. N.J., April 21, 1971).

II.

THE BANKRUPTCY FILING FEE REQUIREMENT VIOLATES APPELLEE'S FIFTH AMENDMENT RIGHT TO ACCESS TO COURT.

We think that the issue here is *not* whether the 'right' to divorce or bankruptcy discharge is more or less important or whether there is some conceivable extra-judicial method for obtaining relief. We submit that there is only one right at issue in this case and that is the right to access to the courts. That right, we insist, must be equally available to all individuals who seek it and not depend upon the greatness or smallness of the particular action pleaded.

If the phrase "due process of law" is to have any substantive content, it must include the requirement that the doors of the courthouse be open and relief available to all litigants regardless of their ability to meet costs or expenses–so long as such relief is not in derogation of some higher social policy[15] or paramount right held by someone else.[16]

In *Powell v. Alabama*, 287 U.S. 45, 65 (1932), this Court said:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common

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[15]Contrary to Appellant's suggestion, a presumed congressional intent to place the bankruptcy court on a 'self-supporting' basis cannot be regarded as a constitutionally recognizable higher social policy than access to the courts.

[16]The 'security-for-costs' cases (Appellant's Brief, pp. 24-25) upon which Appellant relies fall into this category.

> law and statute law of England before the Declaration of Independence, subject however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation."

Applying this test, we see that the right asserted here was an integral part of the common law of England and brought forward into the law of this Nation upon the highest authority.

The first extensive "poor person" statute was enacted in 1495 (11 Hen. VII, c. 12; 2 Stat. of the Realm 578). It provided:

> . . . ever pouer persone or persones which have, or hereafter shall have cause of accion or accions ayenst any persone or persones within this realme shall have, by the discrecion of the Chauncellor of this realme, for the tyme being writte or writtes originall and writtes of sub pena, according to the nature of their causes, therefor nothing paieng to your Highness fot the seales of the same, nor to any persone for the making of the writte & writtes to be hereafter used. And that the said Chanucellor for the tyme being shall assign such of the Clerkis whiche chall doo and use the making and writing of the same writtes to rite the same redy to be sealed, and also lerned councell and attorneys for the same, without any rewarde taking therefor . . . "[17]

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[17]A century later, Elizabeth I, in her Instructions for the Lord President, and Council of the North (1603), directs:

> "XIX. And the Lord President or Vice President may appoint counsellors, attorneys, and process for any poor person so that their cause may proceed without charge."

Quoted at p. 368, Prothero, Select Statutes & Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I (4th ed., Oxford). See also, 23 Hen. VIII, c. 15 (1535).

The English courts have held that this statute was merely "confirmatory of the common law." Tindall, C.J., in *Brunt v. Wardle*, [1841], 3 Man. & Ct. 534, at 542, 133 Eng. Rep., Full Reprint, 1254, at 1257. Similarly California has held the statute of Henry VII to represent a common law doctrine absorbed into the common law of California, (*Martin v. Superior Court*, 176 Cal. 289 [1917]) and Professor Maguire has found in the Reports of the Seldon Society a common law tradition similar to and long antedating the statute of Henry VII. See, Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923).

Indeed persuasive indication of absorption of the common law doctrine into American jurisprudence is in the Revisal of the Laws of Virginia, Bill No. 112. This section, the preamble of which was drafted by Thomas Jefferson and introduced in the Virginia Assembly by James Madison, provided:

"112. A BILL PROVIDING A MEANS TO HELP AND SPEED POOR PERSONS IN THEIR SUITS

Where it is intended that indifferent justice shall be had and administered to all the citizens of this commonwealth, as well as to the poor as rich, which poor citizens be not of ability, nor power, to sue according to the laws of this land for redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance, as other causes; For remedy whereof, in behalf of the poor persons of this land not able to sue for their remedy after the course of the law, Be it enacted by the General Assembly, that every poor person which shall have cause of action against any person within this commonwealth, shall have, by the discretion of the courts before whom he would sue, writ or writs original, and writs of subpoena, according to the

nature of his case, nothing paying for the same; And that said court shall direct their clerk to issue the necessary process, shall assign him counsel learned in the laws, and appoint all other officers requisite and necessary to be had for the speed of said suit to be had and made, who shall do their duties without any regard for their counsels, held and business in the same."[18]

The earliest equivalent expression in the laws of New York was c. 90 sec. XXI of the Laws of 1801 (Kent & Radcliff ed.) which provided:

> . . . every poor person not of ability to sue and who shall have cause of action against any person, shall have by the discretion of the chancellor writs original or writs of subpoena, without paying for the same; and if the suit is to be prosecuted in the court of chancery, the chancellor shall assign to such poor person solicitors and counsel and all other officers, requisite for prosecuting the suit, who shall do their duty therein without taking any regard for the same . . . and in case any such plaintiffs be non-suited, or a verdict or judgment be given against him, he shall not be compelled to pay any costs in such action."[19]

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[18] The Papers of Thomas Jefferson, vol. 2, p. 628 (Princeton 1950); Virginia Acts of 1786, c. LXV; 12 Statutes at Large of Virginia 356-357 (Henning, 1785-88).

[19] Similar statutes were enacted in New Jersey (Laws of New Jersey, 339 (Patterson, 1800)), and the Colonial South Carolina statute (S.C. Acts of 1712, No. 321) was continued in force after Independence (Stat. at Large of S. Carolina, 456-462 [1837]). Georgia, Pennsylvania and Maryland courts all considered the forma pauperis statutes of Henry VII and Henry VIII to be part of the common law and effective in their respective states. See, W. Shley, *Digest of English Statutes in Force in Georgia*, 144-146 (1826); W. Kitty, *A Report of English Statutes in Force in Mary-*

Thus at the time of the ratification of the Constitution, the notion of equal access to the courts was accepted as an integral part of the common law, and this common law principle, essentially for the benefit of civil litigants, was found to be within the original thrust of the Fifth and Fourteenth Amendments' due process clauses. Mr. Justice Field, writing for a unanimous court, put it this way:

> "The Fourteenth Amendment intended . . . that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have *like access to the courts of the country for the protection of their persons and their property, the prevention and redress of wrongs, and the enforcement of contracts." Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885). (emphasis added)

See also, *Truax v. Corrigan*, 257 U.S. 312, 330-334 (1921). *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

Recent decisions of this Court have followed in this tradition, although in applying these principles to the criminal law greater emphasis has been given to the equal protection aspects of the Fifth and Fourteenth Amendments. One of the earliest and perhaps most significant cases in this area is *Griffin v. Illinois*, 351 U.S. 12 (1956). There the Court held that the State must provide without costs an appeal transcript to an indigent prisoner. The *Griffin* decision broadened the dimensions and added new perspectives to the concept of equal protection. The

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land, 229 (1811); 3 Binn. [Pa.] 617, 618 (1808). Rhode Island seems to have rested *its* common law forma pauperis practice on Section 40 of the Magna Carta. See, *Spaulding v. Bainbridge*, 12 R.I. 244 (1879), and New Hampshire simply charged no litigant. See, *Senter v. Carr*, 15 N.H. 375 (1844).

Illinois statute was struck down despite the fact that it was neutral on its face, did not suffer from overclassification or underclassification, and lacked any ulterior discriminatory intent or motive.

Subsequent to *Griffin* this Court further required the State to provide an indigent with a free transcript of preliminary hearing minutes, *Roberts v. LaValle*, 389 U.S. 40 (1967), and with a free transcript of trial proceedings, *Eskridge v. Washington, State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958), and waived the filing fee requirements for a motion for leave to appeal, *Burns v. Ohio*, 360 U.S. 252 (1959), and for habeas corpus petitions, *Smith v. Bennet*, 365 U.S. 708 (1961).

This Court's emphasis in *Griffin* and its progeny upon an equal protection analysis, rather than upon the due process right of access to court, is perhaps explained by the nature of the interests at stake in those cases. None of the cases involved bare access to the court in the first instance. Rather, they involved either access to court at the appellate level or access to the legal instruments realistically need to vindicate legal rights once initial access to court had been obtained.[20]

In conclusion, whether we speak of due process or equal protection as being the operative concept is of little moment. Due process requires that all persons have access to the courts in order to be heard on their claims; equal protection requires that the poor have the same access as those financially more advantaged. Neither theory

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[20]Both are matters of statutory entitlement and, unlike the due process right of access to court, are not independently protected constitutional rights.

permits access to be denied a person because of his financial status.[21]

CONCLUSION

For the above reasons the Decision and Order of the District Court should be affirmed.

Respectfully submitted,

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The Legal Aid Society

Attorney for Appellee

On the Brief:
JOHN E. KIRKLIN
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[21] We would be less than candid if we did not acknowledge that under this analysis all filing fee requirements which bar an indigent's initial access to courts must fall. This result will do little more than place on a constitutional footing what many states have already done either by statute or in recognition of the common law. See National Legal Aid and Defender Association *Amicus Curiae Brief* in *Boddie v. Connecticut*, Appendix A.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* KRAS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 71-749. Argued October 18, 1972—Decided January 10, 1973

Appellee, an indigent who filed a voluntary petition in bankruptcy, sought discharge without payment of the fees, aggregating no more than $50, that are a precondition to discharge in such a proceeding. The District Court, relying primarily on *Boddie* v. *Connecticut*, 401 U. S. 371 (where the Court held that a State could not consistently with due process and equal protection requirements, deny access to divorce courts to indigents unable to pay filing and other fees), held the bankruptcy fee provisions, as applied to appellee, an unconstitutional denial of Fifth Amendment rights of due process, including equal protection. *Held:* This case is not controlled by *Boddie, supra*. For here access to courts is not the only conceivable relief available to bankrupts; the filing-fee requirement does not deny an indigent the equal protection of the laws, since there is no constitutional right to obtain a discharge of one's debts in bankruptcy; the right to a discharge in bankruptcy is not a "fundamental" right demanding a compelling governmental interest as a precondition to regulation; and there is a rational basis for the fee requirement. Pp. 10-16.

331 F. Supp. 1207, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. DOUGLAS and BRENNAN, JJ., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 71–749

United States, Appellant, *v.* Robert William Kras. | On Appeal from the United States District Court for the Eastern District of New York.

[January 10, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Bankruptcy Act and one of this Court's complementary Orders in Bankruptcy impose fees and make the payment of those fees a condition to a discharge in voluntary bankruptcy.

Appellee Kras, an indigent petitioner in bankruptcy, challenged the fees on Fifth Amendment grounds. Upon receiving notice of the constitutional issue in the District Court, the Government moved to intervene as of right under 28 U. S. C. § 2403 and Rule 24 (a) of the Federal Rules of Civil Procedure. Leave to intervene was granted. The District Court held the fee provisions to be unconstitutional as applied to Kras. 331 F. Supp. 1207 (EDNY, 1971). It reached this conclusion in the face of an earlier contrary holding by a unanimous First Circuit. *In re Garland*, 428 F. 2d 1185 (1970), cert. denied, 402 U. S. 966 (1971). Pursuant to 28 U. S. C. § 1252, the Government appealed. We noted probable jurisdiction. 405 U. S. 915 (1972).

I

Section 14 (b)(2) of the Bankruptcy Act, 11 U. S. C. § 32 (b)(2), provides that, upon the expiration of the

time fixed by the court for filing of objections, "the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full." Section 14 (c)(8), 11 U. S. C. § 32 (c)(8), similarly provides that the court "shall grant the discharge unless satisfied that the bankrupt . . . (8) has failed to pay the filing fees required to be paid by this title in full." Section 59 (g), 11 U. S. C. § 95 (g), relates to the dismissal of a petition in bankruptcy and states that "in the case of a dismissal for failure to pay the costs," notice to creditors shall not be required. Three separate sections of the Act thus contemplate the imposition of fees and condition a discharge upon payment of those fees.

Three charges are imposed: $37 for the referees' salary and expense fund, $10 for compensation of the trustee,[1] and $3 for the clerk's services. Sections 40 (c)(1), 48 (c), and 52 (a), 11 U. S. C. §§ 68 (c)(1), 76 (c) and 80 (a). These total $50.[2] The fees are payable upon the filing of the petition. Section 40 (c)(1), however, contains a proviso that in cases of voluntary bankruptcy, all the fees "may be paid in installments, if so authorized by General Order of the Supreme Court of the United States."

The Court's General Order in Bankruptcy No. 35 (4), as amended June 23, 1947, 331 U. S. 873, 876–877, 11 U. S. C. App., p. 2210, complements § 40 (c)(1) and provides that, upon a proper showing by the bankrupt,

[1] Additional compensation to the trustee in an appropriate case is allowable under § 48 (c), 11 U. S. C. § 76 (c), but these provisions have no application for a no-asset or fully-exempt estate.

[2] General Order in Bankruptcy No. 15, 305 U. S. App. 7 (1939), 11 U. S. C. App., at 2203, provides that a trustee need not be appointed in a no-asset case. When a trustee is not appointed, the aggregate fees are $40.

the fees may be paid in installments within a six-month period that may be extended not to exceed three months.[3]

II

Robert William Kras presented his voluntary petition in bankruptcy to the United States District Court for the Eastern District of New York on May 28, 1971. The petition was accompanied by Kras' motion for leave to file and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge. The motion was supported by Kras' affidavit containing the following allegations that have not been controverted by the Government:

1. Kras resides in a 2½ room apartment with his wife, two children, ages 5 years and 8 months, his mother, and his mother's 6-year-old daughter. His younger child suffers from cystic fibrosis and is undergoing treatment in a medical center.

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[3] "(4) The petition in a voluntary proceeding under Chapters I to VII . . . of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt . . . stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

"a. At the first meeting of creditors or any adjournment thereof, the court . . . shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three months.

"b. Upon the failure of a bankrupt . . . to pay any installment as ordered, the court may dismiss the proceeding for failure to pay costs as provided in Section 59, sub. g. of the Act . . . .

"c. No proceedings upon the discharge of a bankrupt . . . shall be instituted until the filing fees are paid in full."

2. Kras has been unemployed since May 1969 except for odd jobs producing about $300 in 1969 and a like amount in 1970. His last steady job was as an insurance agent with Metropolitan Life Insurance Company. He was discharged by Metropolitan in 1969 when premiums he had collected were stolen from his home and he was unable to make up the amount to his employer. Metropolitan's claim against him has increased to over $1,000 and is one of the debts listed in his bankruptcy petition. He has diligently sought steady employment in New York City, but because of unfavorable references from Metropolitan, he has been unsuccessful. Mrs. Kras was employed until March 1970 when she was forced to stop because of pregnancy. All her attention now will be devoted to caring for the younger child who is coming out of the hospital soon.

3. The Kras household subsists entirely on $210 per month public assistance received for Kras' own family and $156 per month public assistance received for his mother and her daughter. These benefits are all expended for rent and day-to-day necessities. The rent is $102 per month. Kras owns no automobile and no asset that is non-exempt under the bankruptcy law. He receives no unemployment or disability benefit. His sole assets are wearing apparel and $50 worth of essential household goods that are exempt under § 6 of the Act, 11 U. S. C. § 24, and under New York Civil Practice Laws and Rules § 5205. He has a couch of negligible value in storage on which a $6 payment is due monthly.

4. Because of his poverty, Kras is wholly unable to pay or promise to pay the bankruptcy fees, even in small installments. He has been unable to borrow money. The New York City Department of Social Services refuses to allot money for payment of the fees. He has no prospect of immediate employment.

5. Kras seeks a discharge in bankruptcy of $6,428.69 in total indebtedness in order to relieve himself and his family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that he obtain a discharge of his debt to Metropolitan soon "because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad references which prevent my getting employment."

The District Court's opinion contains an order, 331 F. Supp., at 1215, granting Kras' motion for leave to file his petition in bankruptcy without prepayment of fees. He was adjudged a bankrupt on September 13, 1971. Later, the referee, upon consent of the parties, entered an order allowing Kras to conduct all necessary proceedings in bankruptcy up to but not including discharge. The referee stayed the discharge pending disposition of this appeal.

III

In the District Court Kras first presented a statutory argument—and, alternatively, one based in common law—that he was entitled to relief from payment of the bankruptcy charges because of the provisions of 28 U. S. C. § 1915 (a).[4] This is the *in forma pauperis* statute that has its origin in the Act of July 20, 1892, c. 209, 27 Stat. 252. See also 28 U. S. C. §§ 832–836 (1940).

The District Court rejected the argument despite the seeming facial application of § 1915 (a) to a bankruptcy

[4] "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

proceeding as well as to any other. It reached this result by noting that § 51 (2) of the Bankruptcy Act, as originally adopted in 1898, 30 Stat. 558–559, had provided for a waiver of fees upon the filing of an affidavit of inability to pay; that by the passage of the Referees' Salary Bill in 1946, 60 Stat. 326, bankruptcy petitions *in forma pauperis* were abolished, H. R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess., 7 (1946); and that the 1946 statute, being later and having a positive and specific provision for postponement of fees in cases of indigency, overrode the earlier general provisions of § 1915 (a). 331 F. Supp., at 1209–1210. To the same effect are *In re Garland*, 428 F. 2d, at 1186–1187, and *In re Smith*, 323 F. Supp. 1082, 1084–1085 (Colo. 1971), the reasoning of which the District Court adopted. So also is *In re Smith*, 341 F. Supp. 1297, 1298 (ND Ill. 1972).

The appellee may well have abandoned the argument on this appeal. Tr. of Arg. 44–45. In any event, we agree, for the reasons stated by the District Court and by the courts in *Garland* and in the two *Smith* cases, *supra*, that § 1915 (a) is not now available in bankruptcy. See 2 Collier on Bankruptcy, ¶ 51.01, at 1873–1874 (14th ed. 1971). Neither do we perceive any common law right to proceed without payment of fees. Congress, of course, sometime might conclude that § 1915 (a) should be made applicable to bankruptcy and legislate accordingly.

The District Court went on to hold, however, 331 F. Supp., at 1210–1215, that the prescribed fees, payment of which was required as a condition precedent to discharge, served to deny Kras "his Fifth Amendment right of due process, including equal protection." *Id.*, at 1212. It held that a discharge in bankruptcy was a "fundamental interest" that could be denied only when a "compelling government interest" was demonstrated. It

noted, *id.*, at 1213, that provision should be made by the referee for the survival, beyond bankruptcy, of the bankrupt's obligation to pay the fees. The court rested its decision primarily upon *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), which came down after the First Circuit's decision in *Garland*, *supra*. A number of other district courts and bankruptcy referees have reached the same result.[5]

Kras contends that his case falls squarely within *Boddie*. The Government, on the other hand, stresses the differences between divorce (with which *Boddie* was concerned) and bankruptcy, and claims that *Boddie* is not controlling and that the fee requirements constitute a reasonable exercise of Congress' plenary power over bankruptcy.

IV

Boddie was a challenge by welfare recipients to certain Connecticut procedures, including the payment of court fees and costs, that allegedly restricted their access to the courts for divorce. The plaintiffs, simply by reason of their indigency, were unable to bring their actions. The Court reversed a district court judgment that a State could limit access to its courts by fees "which effectively bar persons on relief from commencing actions therein." 286 F. Supp. 968, 972. Mr. Justice Harlan, writing for the Court, stressed state monopolization of the means for legally dissolving marriage and identified

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[5] *In re Smith*, 323 F. Supp. 1082 (Colo. 1971) (decided before *Boddie*); *In re Naron*, 334 F. Supp. 1150 (Ore. 1971); *In re Ottman*, 336 F. Supp. 746 (ED Wis. 1972); *In re Smith*, 341 F. Supp. 1297 (ND Ill. 1972); *In re Haddock and Beeman*, Nos. 14810 and 14811 (Conn. 1972); *In re Passwaters*, Nos. 1P70–B–3697 and 1P70–B–3698 (SD Ind. 1971); *In re Ripley*, No. Bk 71–0–1003 (Neb. 1972); *In re Read*, No. Bk 71–826 (WDNY 1971). See *O'Brien* v. *Trevethan*, 336 F. Supp. 1029 (Conn. 1972). But see *In re Partilla*, No. 71–B–380 (SDNY 1971); *In re Malevich*, No. Bk 29–71 (NJ 1971).

the would-be indigent divorce plaintiff with any other action's impoverished defendant forced into court by the institution of a law suit against him. He declared that "a meaningful opportunity to be heard" was firmly imbedded in our due process jurisprudence, 401 U. S., at 377, and that this was to be protected against denial by laws that operate to jeopardize it for particular individuals, *id.*, at 379–380. The Court then concluded that Connecticut's refusal to admit these good-faith divorce plaintiffs to its courts equated with the denial of an opportunity to be heard and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process, *id.*, at 380–381.

But the Court emphasized that "we go no further than necessary to dispose of the case before us." *Id.*, at 382.

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U. S., at 382–383.

MR. JUSTICE DOUGLAS, concurring in the result, rested his conclusion on equal protection rather than due proc-

ess. "I do not see the length of the road we must follow if we accept my Brother Harlan's invitation." 401 U. S., at 383, 385. MR. JUSTICE BRENNAN concurred in part, for he discerned no distinction between divorce and "any other right arising under federal or state law" and he, also, found a denial of equal protection. 401 U. S., at 386, 387. Mr. Justice Black dissented, *id.*, at 389, feeling that the Connecticut court costs were barred by neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment.

Just two months after *Boddie* was decided, the Court denied certiorari in *Garland*. 402 U. S. 966. MR. JUSTICE BRENNAN was of the opinion that certiorari should have been granted. Mr. Justice Black, in an opinion applicable to *Garland* and to seven other then pending cases, 402 U. S. 954, dissented and would have heard argument in all eight cases "or reverse them outright on the basis of the decision in *Boddie*." *Id.*, at 955. For him "the need . . . to file for a discharge in bankruptcy seem[ed] . . . more 'fundamental' than a person's right to seek a divorce." *Id.*, at 958. And MR. JUSTICE DOUGLAS similarly dissented from the denial of certiorari in *Garland* and in four other cases because "obtaining a fresh start in life through bankruptcy proceedings . . . seemingly come[s] within the Equal Protection Clause." 402 U. S. 960, 961.

Thus, although a denial of certiorari normally carries no implication or inference, *Chessman* v. *Teets*, 354 U. S. 156, 164 n. 13 (1957); *Brown* v. *Allen*, 344 U. S. 443 (1953), the pointed dissents of Mr. Justice Black and MR. JUSTICE DOUGLAS to the denial in *Garland* so soon after *Boddie*, and Mr. Justice Harlan's failure to join the dissenters, surely are not without some significance as to their and the Court's attitude about the application of the *Boddie* principle to bankruptcy fees.

V

We agree with the Government that our decision in *Boddie* does not control the disposition of this case and that the District Court's reliance upon *Boddie* is misplaced.

A. *Boddie* was based on the notion that a State cannot deny access, simply because of one's poverty, to a "judicial proceeding [that is] the only effective means of resolving the dispute at hand." 401 U. S., at 376. Throughout the opinion there is constant and recurring reference to Connecticut's exclusive control over the establishment, enforcement, and dissolution of the marital relationship. The Court emphasized that "marriage involves interests of basic importance in our society." *ibid.*, and spoke of "state monopolization of the means for legally dissolving this relationship," *id.*, at 374. "[R]esort to the state courts [was] the only avenue to dissolution of . . . marriages," *id.*, at 376, which was "not only the paramount dispute-settlement technique, but, in fact, the only available one," *id.*, at 377. The Court acknowledged that it knew "of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery," *id.*, at 376. In the light of all this, we concluded that resort to the judicial process was "no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court" and we resolved the case "in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum," *id.*, at 376–377.

B. The appellants in *Boddie*, on the one hand, and Robert Kras, on the other, stand in materially different postures. The denial of access to the judicial forum

in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example, *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities. Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level. See *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Richardson* v. *Belcher*, 404 U. S. 78 (1971). If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities.[6] We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.

C. Nor is the government's control over the establishment, enforcement, or dissolution of debts nearly so exclusive as Connecticut's control over the marriage relationship in *Boddie*. In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. The utter exclusiveness of court access and court rem-

[6] See N. Y. Civil Practice Law and Rules § 5205 (McKinney 1963); N. Y. Labor Law § 595 (McKinney 1965); N. Y. Social Welfare Law § 137 (McKinney 1966), and 137-a (McKinney Supp. 1972-1973).

edy, as has been noted, was a potent factor in *Boddie*. But "[w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts. . . ." 401 U. S., at 376.

However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer. Government's role with respect to the private commercial relationship is qualitatively and quantitatively different than its role in the establishment, enforcement, and dissolution of marriage.

Resort to the Court, therefore, is not Kras' sole path to relief. *Boddie's* emphasis on exclusivity finds no counterpart in the bankrupt's situation. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547–555 (1949).

D. We are also of the opinion that the filing fee requirement does not deny Kras the equal protection of the laws. Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. See *Shapiro* v. *Thompson*, 394 U. S. 618, 638 (1969). Neither does it touch upon what has been said to be the suspect criteria of race, nationality or alienage. *Graham* v. *Richardson*, 403 U. S. 365, 375 (1971). Instead, bankruptcy legislation is in the area of economics and social welfare. See *Dandridge* v. *Williams*, 379 U. S., at 484–485; *Richardson* v. *Belcher*, 404 U. S., at 81; *Lindsey* v. *Normet*, 405 U. S. 56, 74 (1972); *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972). This being so, the applicable

standard, in measuring the propriety of Congress' classification, is that of rational justification. *Flemming* v. *Nestor*, 363 U. S. 603, 611–612 (1960); *Dandridge* v. *Williams*, 397 U. S., at 485–486; *Richardson* v. *Belcher*, 404 U. S., at 81.

E. There is no constitutional right to obtain a discharge of one's debts in bankruptcy. The Constitution, Art. I, § 8, cl. 4, merely authorizes the Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Although the first bankruptcy law in England was enacted in 1542, 34 & 35 Henry 8, c. 4, and a discharge provision first appeared in 1705, 4 Anne, c. 17, primarily as a reward for cooperating debtors, J. MacLachlan, Bankruptcy 20–21 (1956), voluntary bankruptcy was not known in this country at the adoption of the Constitution. Indeed, for the entire period prior to the present Act of 1898, the Nation was without a federal bankruptcy law except for three short periods aggregating about 15½ years. The first statute was the Act of April 4, 1800, 2 Stat. 19, c. 19, and it was repealed by the Act of December 19, 1803, 2 Stat. 248, c. 6. The second was the Act of August 19, 1841, 5 Stat. 440, c. 9, repealed less than two years later by the Act of March 3, 1843, 5 Stat. 614, c. 82. The third was the Act of March 2, 1867, 14 Stat. 517, c. 176; it was repealed by the Act of June 7, 1878, 20 Stat. 99, c. 160. Voluntary petitions were permitted under the 1841 and 1867 Acts. See 1 Collier on Bankruptcy ¶¶ 0.03–0.05, at 6–9 (14th ed. 1971). Professor MacLachlan has said that the development of the discharge "represents an independent . . . public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse" (footnote omitted). J. MacLachlan, Bankruptcy 88. But this obviously is a legislatively created benefit, not a constitutional one, and, as noted, it was a benefit withheld, save for three short periods, during the first 110

years of the Nation's life. The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court. Then too, Congress might have delegated the responsibility to an administrative agency.

F. The rational basis for the fee requirement is readily apparent. Congressional power over bankruptcy, of course, is plenary and exclusive. *Kalb* v. *Feuerstein*, 308 U. S. 433, 438–439 (1940). By the 1946 Amendment, 60 Stat. 326, Congress, as has been noted, abolished the theretofore existing practices of the pauper petition and of compensating the referee from the fees he collected. It replaced that system with one for salaried referees and for fixed fees for every petition filed and a specified percentage of distributable assets. It sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large. H. R. Rep. No. 1037, 79th Cong., 1st Sess., 4–6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess. 2, 5–6 (1946).[7] The propriety of the requirement that the fees be paid ultimately has been recognized even by those district courts that have held the payment of the fee as a precondition to a discharge to be unconstitutional, for those courts would make the payments survive the bankruptcy as a continuing obligation of the bankrupt. *In re Smith*, 323 F. Supp., at 1093; *In re Ottman*, 336 F.

[7] For the decade ended June 30, 1959, the Referee's Salary and Expense Fund showed surpluses for the first five fiscal years and deficits for the last five. For fiscal 1969, 107,481 no-asset cases were terminated (as compared wtih 169,500 nonbusiness cases filed). Administrative Office of the United States Courts, Tables of Bankruptcy Statistics for Fiscal Year Ending June 30, 1969, 5, 10 (1971). This means, of course, that the fees were paid in those terminated no-asset cases. Undue hardship and denial of access to the courts are not apparent from this record of achievement.

Supp., at 748; see *O'Brien* v. *Treventhan*, 336 F. Supp., at 1034.

Further, the reasonableness of the structure Congress produced, and congressional concern for the debtor, are apparent from the provisions permitting the debtor to file his petition without payment of any fee, with consequent freedom of subsequent earnings and of after-acquired assets (with the rare exception specified in § 70 (a) of the Act, 11 U. S. C. § 110 (a)) from the claims of then existing obligations. These provisions, coupled with the bankrupt's ability to obtain a stay of all debt enforcement actions pending at the filing of the petition or thereafter commenced, §§ 11 (a) and 2 (a)(15), 11 U. S. C. §§ 29 (a) and 11 (a)(15); 1A Collier on Bankruptcy ¶ 11.03 (1971); 1 Collier on Bankruptcy ¶ 2.62 [4] (1971), enable a bankrupt to terminate his harassment by creditors, to protect his future earnings and property, and to have his new start with a minimum of effort and financial obligation. It serves also, as an incidental effect, to promote and not to defeat the purpose of making the bankruptcy system financially self-sufficient. Cf. *Lindsey* v. *Normet*, 405 U. S., at 74–79.

G. If the $50 filing fees are paid in installments over six months as General Order No. 35 (4) permits on a proper showing, the required average weekly payment is $1.92. If the payment period is extended for the additional three months as the Order permits, the average weekly payment is lowered to $1.28.[8] This is a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and little more than the cost of a pack or two of cigarettes. If, as Kras alleges in his affidavit, a discharge in bankruptcy will afford him that new start he so desires, and

[8] If the fees total $40, as they may under General Order No. 15, 305 U. S. App. 7 (1939), 11 U. S. C. App., at 2203, these average weekly figures are reduced to $1.54 and $1.03 respectively.

the Metropolitan then no longer will charge him with fraud and give him bad references,[9] and if he really needs and desires that discharge, this much available revenue should be within his able-bodied reach when the adjudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained from creditors.

VI

Mr. Justice Harlan, in his opinion for the Court in *Boddie*, meticulously pointed out, as we have noted above, that the Court went "no further than necessary to dispose of the case before us" and did "not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual." 401 U. S., at 382–383. The Court obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees.

We decline to extend the principle of *Boddie* to the no-asset bankruptcy proceeding. That relief, if it is to be forthcoming, should originate with Congress. See Shaeffer, Proceedings in Bankruptcy In Forma Pauperis, 69 Col. L. Rev. 1203 (1969).

Reversed.

[9] We fail to see how a discharge in bankruptcy in itself will prevent the Metropolitan from issuing an unfavorable reference letter about Kras.

SUPREME COURT OF THE UNITED STATES

No. 71–749

United States, Appellant, v. Robert William Kras.	On Appeal from the United States District Court for the Eastern District of New York.

[January 10, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully in the Court's opinion. The painstaking and precise delineation by Mr. Justice Harlan of the interests involved in *Boddie* ought not to be ignored as the dissenting opinions would do. Moreover, the exclusivity of a State's control of marriage and divorce is a far cry from the degree of government control over relations between debtor and creditor, as MR. JUSTICE BLACKMUN has pointed out. In a bankruptcy proceeding the government, through the court, is no more than the overseer and the administrator of the process; it is not the absolute and exclusive controller as with the dissolution of marriage. Like the descent and distribution of property for which all States have provided statutes and probate courts, the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since many debtors work out binding private adjustments with creditors.

Surely there are strong arguments, as a matter of policy, for the result the dissenting view asserts. But Congress has not yet seen fit to declare the policy that the dissenters now find in the Constitution. In 1970 Congress authorized a tri-partite commission to review the bankruptcy laws.[1] The Commission has been en-

[1] Pub. L. 91–354, 91st Cong., 2d Sess., 84 Stat. 468.

gaged in its task for more than two years and it is hardly likely that this problem will escape its consideration.[2] The Constitution is not the exclusive source of law reform, even needed reform, in our system.

[2] The Commission's mandate requires it to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act "in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities. The Commission's study . . . shall include a consideration of the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to achieve economies in the administration of the Act, and all other matters which the Commission shall deem relevant." Of particular relevance is the preamble to the Act creating the Commission, which recites in part that "the technical aspects of the Bankruptcy Act are interwoven with the rapid expansion of credit which has reached proportions far beyond anything previously experienced by the citizens of the United States."

The report of the Commission is to be submitted prior to June 30, 1973. Pub. L. 92-251, 92d Cong., 2d Sess., 86 Stat. 63.

SUPREME COURT OF THE UNITED STATES

No. 71–749

United States, Appellant, v. Robert William Kras. | On Appeal from the United States District Court for the Eastern District of New York.

[January 10, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

On May 28, 1971, Robert Kras, the appellee, sought to file a voluntary petition in bankruptcy. In an accompanying affidavit, he described his economic plight. He resided in a 2½-room apartment with his wife, his two young children, his mother and her child. His eight-month-old son had cystic fibrosis and at the time of the affidavit was undergoing hospital treatment. Unemployed since May 1969, except for odd jobs, he supported his household on a total public assistance allotment of $366.00 per month—all of which was consumed on rent and the most basic necessities of life. His sole assets consisted of $50 worth of clothing and essential household goods.[1]

He sought a discharge from over $6,000 in debts, particularly his indebtedness to a former employer that he contended hampered his present efforts to find a permanent job: "I earnestly seek a discharge in bankruptcy . . . in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in

[1] These items are exempt from distribution in bankruptcy pursuant to 11 U. S. C. § 24 and N. Y. C. P. L. R. § 5205 (McKinney 1963).

order to make a new start in life. . . . When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care of my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare."

He indicated that he was unable to pay the $50 bankruptcy filing fee in a lump sum,[2] and could not promise to pay it in installments, as required before the petition could be filed.[3] He contended that the fee requirement was unconstitutional as applied to him,[4] and moved for leave to proceed without paying the fee.

The District Court held that under the doctrine of *Boddie* v. *Connecticut*, 401 U. S. 371, the statutory requirement of a prepaid bankruptcy filing fee would violate Kras' Fifth Amendment right to due process of law.

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[2] The fee consists of $37 for the referees' salary and expense fund, $10 compensation for the trustees, and $3 to the clerk as a filing fee. 11 U. S. C. §§ 68 (c)(1), 76 (c), 80 (a).

[3] This Court's General Order in Bankruptcy No. 35 (4), authorized by 11 U. S. C. § 68 (c)(1), permits fees to be paid in installments over a six-month period, amounting to $1.92 a week; and for cause, this period may be extended for an additional three months, so that the debtor would only be required to pay $1.28 per week. But before the bankruptcy petition can be filed, the petitioner must both indicate that he is without and cannot obtain money with which to pay the fee in advance, and set forth the terms upon which he proposes to make installment payments.

[4] The appellee also contended that the filing fee should be waived under the general federal *in forma pauperis* statute, 28 U. S. C. § 1915 (a). That contention was rejected by the District Court on the grounds that, in 1946, Congress expressly eliminated bankruptcy petitions *in forma pauperis*, and substituted installment payments. 11 U. S. C. § 68 (c). In light of the clear congressional intent to eliminate pauper petitions, the Court concluded, Congress did not intend to allow bankrupts to proceed under the general *in forma pauperis* statute. See also *In re Garland*, 428 F. 2d 1185, 1186–1187; *In re Smith*, 323 F. Supp. 1082, 1084–1085. The appellee does not question that conclusion here.

331 F. Supp. 1207, 1212.[5] The Court ordered the petition filed and directed the referee in bankruptcy to make provision for the survival of the appellee's obligation to pay the filing fee. We noted probable jurisdiction of the Government's appeal. 405 U. S. 915. I agree with the District Court and would, therefore, affirm its judgment.

Boddie held that a Connecticut statute requiring the payment of an average $60 fee as a prerequisite to a divorce action was unconstitutional under the Due Process Clause of the Fourteenth Amendment, as applied to indigents unable to pay the fee. The Court reasoned that due process protections are traditionally viewed as safeguards for a defendant, because at the point when a plaintiff invokes the governmental power of a court, the judicial proceeding is "the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." 401 U. S., at 376. But a party to a marriage remains under serious and continuing obligation imposed by the State, which cannot be removed except by judicial dissolution of the marital bond. Thus, we concluded that

> "although they assert here the due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue

[5] Other federal courts have reached the same conclusion. See *In re Haddock*, No. 14810 (Conn., May 22, 1972); *In re Smith*, 341 F. Supp. 1297; *In re Ripley*, No. BK 71-0-1003 (Neb., April 28, 1972); *Application of Ottman*, 336 F. Sup. 746; *In re Naron*, 334 F. Supp. 1150; *In re Read*, No. BK 71-826 (WDNY, Oct. 19, 1971). See also *In re Shropshire* (ND Ia., Mar. 28, 1972); *In re Passwater*, No. IP 70-B-3697 (SD Ind., Dec. 8, 1971). But see *In re Partilla*, No. 71-B-830 (SDNY Oct. 15, 1971); *In re Malevich*, No. BK Misc. 28-71 (NJ, April 21, 1971). *In re Garland*, 428 F. 2d 1185, upon which the Government relies, was decided before our decision in *Boddie*.

to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." 401 U. S., at 376–377.

The violation of due process seems to me equally clear in the present case. It is undisputed that Kras is making a good-faith attempt to obtain a discharge in bankruptcy, and that he is in fact indigent. As was true in *Boddie*, the "welfare income . . barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts . . . ." 401 U. S., at 372–373.[*]

Similarly, the debtor, like the married plaintiffs in *Boddie*, originally entered into his contract freely and voluntarily. But it is the government nevertheless that continues to enforce that obligation, and under our "legal system" that debt is effective only because the judicial machinery is there to collect it. The bankrupt is bankrupt precisely for the reason that the State stands ready to exact all of his debts through garnishment, attachment,

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[*] The appellee indicated in the affidavit submitted with his petition:

"Because of my poverty, I am wholly unable to pay or promise to pay the filing fees, even in small installments, as a condition precedent to discharge and also provide myself and my dependents with day-to-day necessities. I have been unable to borrow money from my family, relatives, or friends. One of the debts of which I seek a discharge in bankruptcy is a loan from my wife's grandmother. The New York City Department of Social Services refuses to allot money for payment of the bankruptcy filing fees. I have no prospect of immediate employment."

and the panoply of other creditor remedies. The appellee can be pursued and harassed by his creditors since they hold his legally enforceable debts.

And in the unique situation of the indigent bankrupt, the government provides the only effective means of his ever being free of these government imposed obligations. As in *Boddie*, there are no "recognized, effective alternatives," 401 U. S., at 376. While the creditors of a bankrupt with assets might well desire to reach a compromise settlement, that possibility is foreclosed to the truly indigent bankrupt. With no funds and not even a sufficient prospect of income to be able to promise the payment of a $50 fee in weekly installments of $1.28, the assetless bankrupt has absolutely nothing to offer his creditors. And his creditors have nothing to gain by allowing him to escape or reduce his debts; their only hope is that eventually he might make enough income for them to attach. Unless the government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself. The government has thus truly pre-empted the only means for the indigent bankrupt to get out from under a lifetime burden of debt.[7]

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[7] In *Boddie*, the Court recognized that marriage was a "fundamental human relationship," 401 U. S., at 383, which involved interests "of basic importance in our society." *Id.*, at 376. But it was not any subjective conception of the "fundamentality" of marriage, or divorce for that matter, which led the Court to find a due process violation in *Boddie;* rather the significant factor about marriage was that "without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval." *Id.*, at 376. It is the existence of judicially enforced obligations coupled with monopolization of the means of dissolution which similarly besets the indigent bankrupt.

The Government contends that the filing fee is justified by the congressional decision to make the bankruptcy system self-supporting.[8] But in *Boddie* we rejected this same "pay as you go" argument, finding it an insufficient justification for excluding the poor from the only available process to dissolve a marriage. 401 U. S., at 382. The argument is no more persuasive here. The Constitution cannot tolerate achievement of the goal of self-support for a bankruptcy system, any more than for a domestic relations court, at the price of denying due process of law to the poor. *In re Naron*, 334 F. Supp. 1150, 1151; *In re Smith*, 323 F. Supp. 1082, 1088.[9]

In my view, this case, like *Boddie*, does not require us to decide "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause . . . so that its exercise may not be placed beyond the reach of any individual . . . ." 401 U. S., at 382–383. It is sufficient to hold, as *Boddie* did, that "a State may not, consistent with the obligations imposed on it by the Due Process Clause . . . , pre-empt the right to dissolve this legal relationship without af-

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[8] Prior to 1946, while pauper petitioners were accepted without payment of fees, the referees whose compensation depended on fees, often demanded payment before granting a discharge. S. Rep. No. 959, 79th Cong., 2d Sess., 6–7 (1945); H. R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945). The 1946 Amendments to the Bankruptcy Act eliminated pauper petitions and provided for the payment of fixed fees for every petition filed, and the payment of a fixed percentage of all distributable assets. See H. R. Rep. No. 1037, 79th Cong., 1st Sess., 4, 5–6 (1945).

[9] See *Fuentes* v. *Shevin*, 407 U. S. 67, 90 n. 22; *Bell* v. *Burson*, 402 U. S. 535, 540–541; *Goldberg* v. *Kelly*, 397 U. S. 254, 261; Cf. *Griffin* v. *Illinois*, 351 U. S. 12.

Moreover, there is no evidence that a substantial amount of revenue would be lost by allowing assetless indigents with no present prospects of paying the fee to file without prepayment. Any loss in fees which did result could be partially recouped by allowing the filing fee debt to survive bankruptcy.

fording all citizens access to the means it has prescribed for doing so." *Id.*, at 383.

The Bankruptcy Act relieves "the honest debtor from the weight of oppressive indebtedness and [permits] him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes," *Williams* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, 554–555. It holds out a promise to the debtor of "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244. Yet the Court today denies that promise to those who need it most, to those who every day must live face-to-face with abject poverty—who cannot spare even $1.28 a week.

The Court today holds that Congress may say that some of the poor are too poor even to go bankrupt. I cannot agree.

SUPREME COURT OF THE UNITED STATES

No. 71–749

United States, Appellant, *v.* Robert William Kras.	On Appeal from the United States District Court for the Eastern District of New York.

[January 10, 1973]

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN.

While we join MR. JUSTICE STEWART's dissenting opinion we do so with this explicit statement of reasons. We said in *Bolling* v. *Sharpe*, 347 U. S. 497, when holding that segregation of students in the District of Columbia violated the Due Process Clause of the Fifth Amendment:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

The invidious discrimination in the present case is a denial of due process because it denies equal protection within our decisions which make particularly "invidious" discrimination based on wealth or race.

SUPREME COURT OF THE UNITED STATES

No. 71–749

United States, Appellant, v. Robert William Kras.	On Appeal from the United States District Court for the Eastern District of New York.

[January 10, 1973]

MR. JUSTICE MARSHALL, dissenting.

The dissent of MR. JUSTICE STEWART, in which I have joined, makes clear the majority's failure to distinguish this case from *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). I add only some comments on the extraordinary route by which the majority reaches its conclusion.

A. The majority notes that the minimum amount that appellee Kras must pay each week if he is permitted to pay the filing fees in installments is only $1.28. It says that "this much available revenue should be within his able-bodied reach." *Ante*, at —.

Appellee submitted an affidavit in which he claimed that he was "unable to pay or promise to pay the filing fees, even in small installments." App. 5. This claim was supported by detailed statements of his financial condition. The affidavit was unchallenged below, but the majority does challenge it. The District Judge properly accepted the factual allegations as true. See, *e. g.*, *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1962); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968); 35B C. J. S. Federal Civil Procedure § 1197 n. 4. The majority seems to believe that it is not restrained by the traditional notion that judges must accept unchallenged, credible affidavits as true, for it disregards the factual allegations and the inferences which

necessarily follow from them. I cannot treat that notion so cavalierly.[1]

Even if Kras' statement that he was unable to pay the fees was honestly mistaken, surely he cannot have been mistaken in saying that he could not promise to pay the fees. The majority does not directly impugn his good faith in making that statement. Yet if he cannot promise to pay the fees, he cannot get the interim relief from creditor harassment which, the majority says, may enable him to pay the fees.

But beyond all this, I cannot agree with the majority that it is so easy for the desperately poor to save $1.92 *each week* over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than $1,000 or $19.23 a week. U. S. Bureau of Census, Current Population Reports, series P–60; U. S. Bureau of Census, Statistical Abstract of the United States: 1972, at 328. I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.[2]

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[1] The majority also misrepresents appellee's financial condition. It says that $1.28 "is a sum less than the payments Kras makes on his couch of negligible market value in storage." *Ante*, at —. Nowhere in the slender record of this case can I find any statement that appellee is actually paying anything for the storage of the couch. He said only that he "*owed* payments of $6 per month" for storage. App. 5 (emphasis added). He also stated that he owed $6,428.69, but I would hardly read that to mean that he was paying that much to anyone.

[2] The majority, in citing the "record of achievement" of the bankruptcy system in terminating 107,481 no-asset cases in the fiscal year 1969, *ante*, n. 7, relies on spectral evidence. Because the filing fees bar relief through the bankruptcy system, statistics showing how many people got relief through that system are unenlightening on the question of how many people could not use the system because they were too poor. I do not know how many people cannot

It may be easy for some people to think that weekly savings of less than $2.00 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

B. The majority derives some solace from the denial of certiorari in *In re Garland*, 402 U. S. 966 (1971). Reliance on denial of certiorari for *any* proposition impairs the vitality of the discretion we exercise in controlling the cases we hear. See *Brown* v. *Allen*, 344 U. S. 443, 491–492 (1953) (opinion of Frankfurter, J.). For all that the legal community knows, Mr. Justice Harlan did not join the dissent from denial of certiorari in that case for reasons different from those which the majority uses to distinguish this case from *Boddie*. Perhaps he believed that lower courts should have some time to consider the

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afford to pay a $50 fee in installments. But I find nothing in the majority's opinion to convince me that due process is afforded a person who cannot receive a discharge in bankruptcy because he is too poor. Even if only one person is affected by the filing fees, *he* is denied due process.

implications of *Boddie*. Most of the lower courts have refused to follow the First Circuit's decision in *Garland*. See *ante*, at —— n. 5 (opinion of MR. JUSTICE STEWART). Perhaps he thought that the record in that case made inappropriate any attempt to determine the scope of *Boddie* in that particular case. Or perhaps he had some other reason.

The point of our use of a discretionary writ is precisely to prohibit that kind of speculation. When we deny certiorari, no one, not even ourselves, should think that the denial indicates a view on the merits of the case. It ill serves judges of the courts throughout the country to tell them, as the majority does today, that in attempting to determine what the law is, they must read, not only the opinions of this Court, but also the thousands of cases in which we annually deny certiorari.[3]

C. The majority says that "the denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship." It sees "no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy." *Ante*, at ——. If the case is to turn on distinctions between the role of courts in divorce cases and their role in bankruptcy cases,[4] I agree

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[3] That one of us undertook to write a dissent, even a "pointed dissent," from the denial of certiorari should suggest, again, nothing at all about the views of any other Members of the Court on the merits of the petition. Surely each of us has seen many cases in which a colleague's dissent from the denial of certiorari pointed to an issue of great concern which we thought should be decided by this Court, but in which we did not join because we did not consider the case to be an appropriate vehicle for determination of that issue.

[4] I am intrigued by the majority's suggestion that, because the granting of a divorce impinges on "associational interests," the right to a divorce is constitutionally protected. Are we to require that state divorce laws serve compelling state interests? For example, if a State chooses to allow divorces only when one party is shown to

with MR. JUSTICE STEWART that this case and *Boddie* cannot be distinguished; the role of the Government in standing ready to enforce an otherwise continuing obligation is the same.

However, I would go further than MR. JUSTICE STEWART. I view the case as involving the right of access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to a discharge in bankruptcy.[5] When a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim is a court. Kras, for example, claims that he has a right under the Bankruptcy Act to be free of any duty to pay his creditors. There is no way to determine whether he has such a right except by adjudicating his claim.[6] Failure to do so denies him access to the courts.

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have committed adultery, must its refusal to allow them when the parties claim irreconcilable differences be justified by some compelling state interest? I raise these questions only to suggest that the majority's focus on the relative importance in the constitutional scheme of divorce and bankruptcy is misplaced. What is involved is the importance of access to the courts, either to remove an obligation which other branches of the government stand ready to enforce, as MR. JUSTICE STEWART sees it, or to determine claims of right, as I see it.

[5] The majority suggests that no such right is involved, because Congress could have committed the administration of the Bankruptcy Act to a nonjudicial agency. *Ante,* at —. I have some doubt about the proposition that a statutorily created right can be finally determined by an agency, with no method for a disappointed claimant to secure judicial review. But I have no doubt that Congress could not provide that only the well-off had the right to present their claims to the agency. As should be clear, the question is one of access to the forum empowered to determine the claim of right; it is only shorthand to call this a question of access to the courts.

[6] It might be said that the right he claims does not come into play until he has fulfilled a condition precedent by paying the

The legal system is of course not so pervasive as to preclude private resolution of disputes. But private settlements do not determine the validity of claims of right. Such questions can be authoritatively resolved only in courts. It is in that sense, I believe, that we should consider the emphasis in *Boddie* on the exclusiveness of the judicial forum—and give Kras his day in court.

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filing fees. But the distinction between procedure and substance is not unknown in the law and can be drawn on to counter that argument.